Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SANDRA K. NORTON,

Petitioner,

v.

ANTHONY CATANESE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public employer, consistent with the Petition Clause of the First Amendment, may discharge a tenured professor because the professor filed a Petition for Writ of Mandamus against the employer to enforce compliance with a State statute mandating disclosure of public records.

2. Whether a public employer, consistent with the Petition Clause of the First Amendment, may discharge a tenured professor because the professor filed a lawsuit against the employer seeking damages for Constitutional violations.

3. Whether a public employee is stripped of First Amendment protection because she has a personal interest in the outcome of lawsuits she filed against her employer.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, the parties in the proceedings below were Anthony Catanese, Lynda Quillen, Ondina Felipe, Richard Osburn, Carla Coleman, James Malek, Jean-Louis Baldet, David Anderson (all sued in their individual capacities) and The Board of Regents of the Division of Universities of the Florida Department of Education.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sandra K. Norton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reprinted in the Appendix to this Petition ("App.") at 1-11. The order of the district court is unreported and is reprinted at App. 12-28.

JURISDICTION

The court of appeals entered judgment on August 16, 2001 and denied petitions for rehearing and for rehearing *en banc* on October 26, 2001. App. 31-33. Justice Kennedy extended the time for filing the petition for a writ of certiorari to and including February 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides, in relevant part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const., art. I.

The relevant portions of Florida's Public Records Act are as follows:

> It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.

Chapter 119.01, Florida Statutes.

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee.

Chapter 119.07(1)(a), Florida Statutes. Other relevant portions of the Act state that members of the public may copy public records, Chapter 119.08, Florida Statutes, and may file a civil action to enforce the Act. Chapter 119.11, Florida Statutes. Any public officer who knowingly violates the Public Records Act is guilty of a misdemeanor of the first degree and is subject to suspension and removal or impeachment. Chapter 119.10; Chapter 119.02, Florida Statutes. Wherever a court orders an entity to comply with the Public Records Act, the agency must comply with the order within 48 hours, unless otherwise provided. Chapter 119.11(2), Florida Statutes.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner's First Amendment retaliation claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court and the Eleventh Circuit Court of Appeals held that neither the Petition Clause nor the Free Speech Clause protects a public employee from retaliatory discharge even where the employee has filed a lawsuit against her public employer to enforce compliance with a state's public records law and subsequently filed a lawsuit against her employer seeking damages for Constitutional violations.

B. Factual Background

In August of 1996, Dr. Sandra K. Norton ("Petitioner"), then a tenured professor, filed a petition for writ of mandamus to force her public employer, Florida Atlantic University ("University") to comply with Florida's Public Records Act, Chapter 119, Florida Statutes. App. 34, ¶27. For months before Petitioner filed the petition for writ of mandamus against the University, she asked the University to release certain public records under Florida's Public Records Act. *Id.* The University refused to comply. *Id.* Therefore, Petitioner was forced to file a petition for writ of mandamus to force the University to disclose the public records. *Id.* The petition for writ of mandamus was granted on August 30, 1996 when Petitioner obtained an order from Palm Beach Circuit Court Judge John Hoy requiring the University to comply with the Public Records Act. App. 34, ¶29; App. 78.

Florida's Public Records Act states, in relevant part, that "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." Chapter 119.01, Florida Statutes.[1] Further, the Public Records Act states that:

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee.

Chapter 119.07(1)(a), Florida Statutes. Members of the public may also make copies of any public records. Chapter 119.08, Florida Statutes. Any public officer who knowingly violates the Public Records Act is guilty of a misdemeanor of the first degree and is subject to suspension and removal or impeachment. Chapter 119.10; Chapter 119.02, Florida Statutes. If a public entity refuses to comply with the Public Records Law, any member of the public may file an action to enforce the law and the court shall set an immediate hearing, giving the case priority over other pending cases. Chapter 119.11, Florida Statutes. Wherever a court orders an entity to comply with the Public Records Act, the agency must comply with the

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[1] The Act defines "public records" broadly as "all documents, papers, [. . .] or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of official business by any agency." Chapter 119.011(1), Florida Statutes. An "agency" is any entity created or established by law and any private entity acting of behalf of a public agency. Chapter 119.011(2), Florida Statutes.

order within 48 hours, unless otherwise provided. Chapter 119.11(2), Florida Statutes.

Petitioner was Dean of the College of Arts and Humanities at the University from 1987 until she resigned from the deanship in 1994 to occupy one of the University's Eminent Scholar "Superchairs"and to become the Director of the Schmidt Institute for Comparative Studies. App. 37, ¶¶13-15; App. 67. In 1994, the University entered into a contract with Petitioner pursuant to which Petitioner would hold a "Superchair" and be the Director of the Schmidt Institute for Comparative Studies. *Id.*, ¶15. In the new positions, Petitioner was expected to bring distinguished visiting scholars to the University from around the world to enhance the University's arts and humanities programs. App. 67. The Schmidt Institute placed special emphasis upon recognizing and supporting women scholars, artists and students, an interest that is vital to the arts and economics of South Florida and the nation. App. 68; App. 38-39, ¶17. The "Superchair," directorship, and the Schmidt Institute, were funded by a $10,000,000 gift made by philanthropist Charles E. Schmidt to the University in 1991. App. 36, ¶12. The gift was matched on a dollar to dollar basis by funds from the State of Florida. *Id.* The gift represents the largest cash grant to an academic program ever received in the history of public education in Florida. *Id.* The University's President, Respondent Anthony Catanese, acknowledged that Petitioner was a "key player" in obtaining the gift. App. 37, ¶13.

On July 15, 1994, The University issued a press release stating that Petitioner was the occupant of the Eminent Scholar "Superchair" and would direct the

Schmidt Institute. App. 67-68. In the laudatory press release, Petitioner was praised for her "energetic, vigorous leadership." App. 67. In the press release, Respondent Anthony Catanese said of Petitioner, "We place her at the head of the Schmidt Institute with strong confidence that she will guide it with the same sure hand that marked her seven years of outstanding service as dean." App. 67-68. The press release also stated that the ten million dollar Schmidt donation was obtained "[u]nder Dr. Norton's leadership" and included quotes from University Vice President Nathan Dean, who said that he accepted Petitioner's resignation from the deanship "with great regret." App. 68. Petitioner's appointment to the Eminent Scholar "Superchair" and Director of the Schmidt Institute for Comparative Studies was reported in the local newspapers. App. 70-71.

In early 1996, an unflattering article appeared in a Palm Beach County newspaper, questioning some of the expenditures Petitioner made as Eminent Scholar and occupant of the "Superchair." App. 39-40, ¶21. The University wrote a letter to the editor of the paper fully supporting Petitioner and stating that the University supervised and approved of her expenditures. App. 40, ¶22. However, after the article appeared, the new Dean of the University's College of Arts and Humanities refused to approve Petitioner's 1996-1997 budget and, instead, reallocated more than one-half of the funds accruing to the Schmidt "Superchair" for his own use. App. 40, ¶23. Believing that the reallocation of the ten million dollar Schmidt donation and State matching funds for the Dean's personal use was a violation of State statute and regulation, and a contradiction of the donor's intentions,

Petitioner attempted unsuccessfully to obtain public records from the University, namely, documents reflecting any agreement between the University and the donor as to how the donation was to be used. App. 41, ¶¶25, 26.

After Petitioner filed the Public Records Act lawsuit against the University, the University retaliated against her by issuing a press release stating that Petitioner did not occupy the "Superchair" and announcing a search for someone to occupy it. App. 42, ¶29. The University also retaliated against Petitioner by seizing books and records from her office, posting a police guard at her office, and permitting its officials to conspire to uncover evidence that might support false allegations of financial irregularities, or other false charges, against Petitioner. App. 43-44. Further, in a press release dated September 5, 1996, Respondent Anthony Catanese stated that Petitioner engaged in "excessive spending patterns," was "an unpopular dean," "was considered arbitrary, high-handed and unfair," received "chronically low evaluations," and was not primarily responsible for obtaining the Schmidt donation. App. 78-81.

In January of 1997, Petitioner filed a lawsuit in the United States District Court for the Southern District of Florida against the University and the officials who retaliated against her. App. 14. The federal lawsuit included claims arising under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments to the United States

Constitution, under the Equal Pay Act, and under state law for breach of contract.[2]

Shortly after Petitioner filed the federal lawsuit, the University retaliated against Petitioner by opposing her request for a medical leave of absence necessitated by surgery. App. 44-45. Petitioner suffered an post-operative infection which prohibited her from returning to work as soon as she had anticipated. *Id.* Petitioner's direct supervisor admitted that Petitioner was being held to different standards because of the pending litigation and that, unlike other faculty members, she would have to prove her illness. App. 44, ¶32. On February 17, 1997, Petitioner advised the University that she would return to work on March 3, 1997. App. 45, ¶34. Petitioner also submitted sick-leave forms to the University delineating the dates and reasons for her absences so that the University's personnel department could subtract the dates of absence from Petitioner's accrued sick-leave. *Id.* Notwithstanding Petitioner's promise to return to work on March 3, 1997, the University threatened to fire Petitioner for job abandonment and continued to harass, intimidate, and punish her for having sought redress in the state and federal courts. On March 3, 1997, Petitioner returned to work. App. 47, ¶39. Despite Petitioner's return to work, the University issued a letter on March 7, 1997 stating that it intended to terminate Petitioner's tenured employment. App. 47, ¶40. Petitioner's termination became final in

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[2] The University filed a Motion to Dismiss in which it argued that the Complaint did not reflect its proper name. To correct the name, and otherwise clarify the allegations, Petitioner filed an Amended Complaint in March of 1997.

May of 1997 after Petitioner exhausted the University's grievance procedure. App. 47, ¶42-43.

Petitioner filed a Second Amended Complaint complaining of First Amendment retaliatory discharge. App. 14-15. Petitioner cited her first lawsuit arising under Florida's Public Records Act and her subsequent lawsuit arising under 42 U.S.C. § 1983 as activity protected by the First Amendment to the United States Constitution. *Id.*; App. 50, ¶48. Specifically, Petitioner alleged that the University violated her First Amendment right to free speech and right to petition. App. 51, ¶49. On December 29, 1998, the district court dismissed Petitioner's First Amendment retaliation claims pursuant to Federal Rule of Civil Procedure 12(b)(6).[3] App. 12-30. Petitioner's appeal to the Eleventh Circuit Court of Appeals timely followed.

C. Decision of the Court of Appeals

The United States Court of Appeals for the Eleventh Circuit affirmed. First, the Eleventh Circuit panel held that the First Amendment does not protect public employees from retaliatory discharge in the right to petition context unless the petition itself addresses a "public concern." App. 7. Second the panel held that Petitioner's Second Amended Complaint failed to allege that Petitioner's 1996 lawsuit enforcing Florida's Public Records

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[3] The district court also dismissed Petitioner's Due Process claim and declined to exercise its supplemental jurisdiction over the breach of contract claim. Petitioner did not, and does not, appeal those decisions.

Law and Petitioner's 1997 lawsuit seeking damages for Constitutional violations addressed matters of "public concern." App. 6-7. Third, the panel held that even if Petitioner's lawsuits addressed matters of public concern, Petitioner's personal interest in the outcome of her lawsuits unilaterally eliminated the public concern addressed therein and stripped Petitioner of any protection under the First Amendment. App. 6-7.

ARGUMENT

This case presents three important and recurring issues of great legal significance:

- Can a public employer freely retaliate against an employee because the employee filed a lawsuit forcing the employer to comply with a state law mandating public disclosure of the employer's records?

- Can a public employer freely retaliate against an employee because the employee filed a lawsuit seeking damages for violations of Constitutional rights?

- Is a public employee stripped of protection under the First Amendment merely because the employee has a personal interest in the outcome of lawsuits seeking redress for the employer's violation of state and federal law?

A. The Petition Clause

Courts of appeal considering the first two questions have reached conflicting conclusions. Compare *Gable v. Lewis*, 201 F.3d 769 (6th Cir. 2000); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990); and *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986) with *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Rendish v. City of Tacoma*, 134 F.3d 1389 (9th Cir. 1998); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2nd Cir. 1993); *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988) and *Day v. South Park Independent School District*, 768 F.2d 696 (5th Cir. 1985).

Essentially, the courts of appeal are divided into three groups. One group, including the Eleventh Circuit in this case, acknowledges that the Petition Clause is distinct from the Free Speech Clause, but applies the *Connick v. Myers*, 461 U.S. 138 (1972) threshold test to both without much discussion. *Rendish v. City of Tacoma*, 134 F.3d 1389 (9th Cir. 1998); *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Day v. South Park Independent School District*, 768 F.2d 696 (5th Cir. 1985). The second group suggests that it would be inappropriate to apply the *Connick* threshold test to the Petition Clause. *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990); *Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). A third group has declined to apply *Connick* to public employees' right to petition claims. *Gable v. Lewis*, 201 F.3d 769 (6th Cir. 2000); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994). *See* Kara Elizabeth Shea, *San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*,

48 Vand.L.Rev. 1697 (1995).[4] Petitioner respectfully requests that the Court grant her petition for writ of certiorari to resolve this conflict over the scope of claims arising under the Petition Clause. This case is appropriate for review because it involves the most sacred of rights to petition, that is, the right of access to the courts.

The genesis of the disagreement over claims arising under the Petition Clause appears to be *McDonald v. Smith*, 472 U.S. 479, 482 (1985). In *McDonald*, the Court held that allegedly libelous letters to the President were not protected under the Speech or Petition Clauses and, in doing so, stated that "the right to petition is cut from the same cloth as the other guarantees of that Amendment, and is assurance of a particular freedom of expression." *Id.* at 482-485. While the Court has not written separately to define the Petition Clause as it relates to public employees' litigation, the Court has found that the right of access to the courts is protected under the First Amendment without engaging in a "matter of public concern" analysis. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The Court reiterated the importance of the right of access to the courts in *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 741 (1983):

> In *California Motor Transport*, we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly we construe the antitrust laws as not prohibiting

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[4] Ms. Shea discusses a fourth group, which does not acknowledge the Petition Clause at all and merely applies *Connick* to all First Amendment claims without discussion. *Id.*

> the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a 'mere sham' filed for harassment purposes.

Id. Courts continue to struggle with the decisions in *McDonald, California Motor Transport* and *Bill Johnson's Restaurant*, none of which directly address the Petition Clause in the context of public employees' litigation. Compare *Rendish v. City of Tacoma*, 123 F.3d 1216, 1221, (9th Cir. 1998) (finding no protection for public employee's litigation based on *McDonald*); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994) (finding protection for public employee's litigation based on *California Motor Transport* and *Bill Johnson's Restaurant*).

B. The Role of Personal Interest in the Petition and Free Speech Clauses

This case raises another issue over which the courts of appeal have disagreed, that is, whether a public employee is stripped of First Amendment protection merely because the employee has a personal interest in the outcome of her lawsuit or, in other cases, her speech. Compare *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Badia v. City of Miami*, 133 F.3d 1443 (11th Cir. 1998); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) with *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996); *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (*en banc*). The split of authority has also created disparate results within the circuits. Compare *Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290 (11th Cir. 1998); *Tindal v. Montogomery County Commissioners*, 32 F.3d 1535 (11th Cir. 1994);

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) with *Pearson v. Macon-Bibb County Hosp. Authority*, 952 F.2d 1274 (11th Cir. 1992); *Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997). Compare *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984) with *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994).

The split of authority can be separated into two groups. One group acknowledges that a public employee's personal interest in the outcome of her petition, or her speech, does not strip her of protection under the First Amendment. *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (*en banc*), *cert. denied*, 501 U.S. 1204 (1991); *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996). The second group denies First Amendment protection to any public employee who maintains a "personal interest" in the outcome of a controversy. *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Badia v. City of Miami*, 133 F.3d 1443 (11th Cir. 1998); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997).

In this case, the Eleventh Circuit extended the ban on First Amendment protection to an extreme, dismissing Petitioner's right to petition claim pursuant to Rule 12(b)(6) simply because Petitioner maintained some personal interest in obtaining public records under Florida's Public Records Act. Notably, Petitioner's Public Records lawsuit merely sought the disclosure of public records and did not seek redress for any employment dispute. After Petitioner prevailed in that action, the University responded via a press release in which it stated that the documents the court ordered it to disclose had nothing to

do with Petitioner. App. 79. In doing so, the University conceded that Petitioner's public records lawsuit was of public concern and that the public records sought did not concern Petitioner's personal interest. The Seventh Circuit Court of Appeals, along with other circuits listed above, has squarely rejected this ban. *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994), *reh'g denied*, 1994 U.S. App. LEXIS 23294 (7th Cir., Aug. 26, 1994); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991).

If the courts of appeal continue to deny First Amendment protection to those who maintain some personal interest in the outcome of their petitions and/or speech, there will be little protection left, if any, for public employees who file lawsuits against their employers. One can hardly imagine a case where the plaintiff does not have any personal interest in obtaining relief sought in a lawsuit. Indeed, a plaintiff must have some interest in the outcome of any lawsuit to maintain standing. Particularly where, as here, Petitioner first sued for injunctive relief only, seeking only the disclosure of documents, she should not lose First Amendment protection merely because she had an interest in obtaining the documents.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 22, 2002

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13486

D.C. Docket No. 97-08014 CV-DTKH

SANDRA K. NORTON, Ph.D.,

Plaintiff-Appellant,

versus

FLORIDA ATLANTIC UNIVERSITY,

Defendant,

ANTHONY JAMES CATANESE,
RICHARD L. OSBURN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed August 16, 2001)

Before EDMONDSON, DUBINA and POLITZ*, Circuit Judges.

PER CURIAM:

This is an appeal from a final judgment entered in favor of all defendants and against the plaintiff/appellant

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* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Sandra K. Norton ("Norton") in an action brought in the United States District Court for the Southern District of Florida. Norton presented claims of employment discrimination and retaliation under federal law and pendant state claims arising under contract. More specifically, Norton alleged in her complaint that the Board of Regents of the Division of Universities of the Florida Department of Education ("the Board") and eight individual defendants discriminated and retaliated against her because of her gender and for exercising her First Amendment right to free speech. She also alleged an Equal Pay Act claim. The district court dismissed all of Norton's claims, except the Equal Pay Act claim, under Fed.R.Civ.P. 12(b)(6). We affirm.

I. BACKGROUND

Norton, a former faculty member in the College of Arts and Humanities of Florida Atlantic University ("the University"), had served as Dean of that college from 1987 until her resignation from that position in July of 1994. She remained a faculty member of the University until her termination in May of 1997. In 1991, Charles E. Schmidt ("Schmidt"), a local philanthropist and long time benefactor of the University, began contributing funds toward the establishment of two endowed "Superchairs." Upon Norton's resignation as Dean in 1994, and following a no confidence vote by a majority of the participating faculty of the college, the university offered her the position of Director of the Schmidt Institute for Comparative Studies.

In 1996, a dispute arose between Norton and the University administration about whether she was the proper holder of one of the two Superchairs. According to Norton's allegations, James Maleck ("Maleck"), the Dean of the College of Arts and Humanities, reallocated half of the funds accruing from one of the Superchair endowments to the new programs at the College.

Because of her dispute with the University, Norton retained a law firm and made a request under State law for public records. Norton states in her pleadings that her purpose in seeking access to those public records was to substantiate the University's position that she was not the occupant of Superchair II. Norton did not receive all the documents she wanted, so she petitioned the court for a writ of mandamus to obtain those records.

Norton alleged that the Defendants violated her First Amendment rights by conspiring to retaliate against her because she sought access to public records and sought redress of her grievances in a court of law. Norton also alleged that the Defendants retaliated against her by seizing books and records from her office, posting a guard outside her office, threatening to fire her, and undertaking a "witch hunt" to attempt to uncover financial irregularities in her expenditures.

On January 14, 1997, Norton requested medical leave from Department Chairman Jean L. Baldet ("Baldet"). Norton stated that leave was necessary for sinus surgery and indicated that she would be back to work by January 27. Norton did not return on January 27, and Baldet had limited success in reassigning her classes. Norton repeatedly gave Baldet projected return dates, and each time

gave short notice that she would be unable to make the projected return dates. The University wrote Norton's attorney on February 20, requesting a statement from Norton's physician informing the school when Norton could be expected to return to class. Norton did not provide a physician's statement. The University corresponded with Norton's attorney over the next two weeks and it gave deadlines and extended deadlines. Norton refused to provide a physician's statement until the University cited the authority by which it could make such a request. Norton alleged that the University's actions were in retaliation for the previously filed lawsuit.

The University faxed Norton a letter on March 1, 1997, stating that she had not been fired. The University, however, gave Norton until March 3, 1997, to provide the requested physician's statement, and if she did not respond, the University would regard her as having abandoned her job. Norton never provided the physician's statement, but alleges that on March 3, 1997, she returned to the campus to pick up some papers and on March 6 attended a meeting with students. The University subsequently advised Norton that it intended to terminate her employment for cause due to her failure to provide the physician's statement. The University attached a copy of the Florida Administrative Code section on the University's grievance procedure. *See Florida Administrative Procedures Act, Chapter 120, § 665-5.011.*

Norton attended only two steps of the three step review procedure set forth by the University. Instead, after her stop two review she sought leave to file her second amended complaint. In her second amended complaint, Norton alleged retaliatory action as a result of her

request for documents she felt might be relevant to her dispute over the Superchair. She also alleged that the individual defendants deprived her of her procedural due process rights on the course of her discharge proceedings, and she reasserted her state law claims against the University.

The Defendants moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(6). The Defendants challenged the First Amendment retaliation claims on the ground that Norton's activities were not protected under the First Amendment. They challenged the due process claims on the grounds that Norton failed to pursue available state law remedies and that procedural due process does not require an impartial referee. The Defendants also raised the defense of qualified immunity. The University moved for dismissal on several grounds, including Eleventh Amendment Immunity. The district court dismissed the claims against all individual Defendants and dismissed all claims against the University except the Equal Pay Act claim. The Defendants did not file a cross-appeal on this claim.

II. ISSUES

1. Whether the district court erred by dismissing Norton's First Amendment retaliation claims pursuant to Fed.R.Civ.P. 12(b)(6).

2. Whether the district court erred by determining that Norton's action seeking the release of documents and in filing her subsequent lawsuit did not implicate matters of public concern.

3. Whether the district court erred by denying Norton's motion for leave to file a third amended complaint.

III. STANDARDS OF REVIEW

This court reviews *de novo* the district court's dismissal of a complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186, 1189 (11th Cir. 1997). This court reviews *de novo* the defense of qualified immunity raised in a motion to dismiss. *GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1367 (11th Cir. 1998). This court reviews a district court's denial of a motion for leave to amend a complaint for abuse of discretion. *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815, 822-23, n.6 (11th Cir. 1999).

IV. DISCUSSION

A.

Norton first contends that the various individual defendants retaliated against her because she sought to obtain documents, pursued a mandamus action in state court under the state public records law, and filed the present lawsuit in federal court. The district court determined that Norton's actions did not implicate matters of public concern since the primary thrust of her purpose in seeking the documents was to support her claim in a private dispute over her entitlement to an endowed chair. We have carefully reviewed Norton's complaint, as amended, and conclude that she fails to allege that the

documents she sought implicated matters of public concern. Norton states in her complaint that she sought to obtain the documents to substantiate the University's position that she was not the occupant of Superchair II. Norton's own statements in her complaint indicate that this is not a matter of public concern, but is a personal employment dispute.

The Supreme Court has established a four step analysis to assess whether a public employee has an actionable claim based upon violation of his rights under the First Amendment when he has been discharged or suffered some other adverse employment action as a result of his speech activity. *See Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). The Supreme Court further clarified that whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement. *See Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690 (1983). Following *Connick*, this court has addressed the issue in a number of decisions which have clearly drawn the line between what is and what is not speech activity that involves matters of public concern.

To be entitled to First Amendment protection in the right to petition context, the Eleventh Circuit requires that the petition at issue address a public concern. *Grigley v. City of Atlanta*, 136 F.3d 752, 755 (11th Cir. 1998).[1]

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[1] In its order, the district court noted that there is a contrary holding in the Third Circuit which it would like to follow, *San*

Whether an employee's speech addresses a matter of public concern turns on the employee's purpose in speaking, i.e., was the employee primarily speaking in his role as citizen or his role as employee. *See Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993). To determine the employee's purpose in speaking, courts consider the context, form and content of the speech. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690. This speech test also applies to right-to-petition claims. *Grigley*, 136 F.3d at 754; *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir. 1997).

Norton admits that she filed the public records request to obtain documents that would support her claim to the endowed professorship. Nonetheless, she contends that the act of petitioning itself is a public act and presents issues of public concern because allowing retaliation for filing suit would chill exercise of the right of access to the courts. Secondly, Norton argues that because the Florida Constitution allows every person the right to inspect public documents, her public records action necessarily implicated public concern. The Defendants counter that the act of petitioning itself is not sufficient to implicate public concern. Instead, the Defendants posit that the documents themselves must address a public concern.

The district court held that the form (filing a lawsuit against a public entity) of Norton's First Amendment claim concerns the public; however, the content and context of her petitions are purely personal. Norton filed the

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Filippo v. Bongiovanni, 30 F.3d 424 (3rd Cir. 1994), but the court recognized that it must follow the precedents of the Eleventh Circuit.

public records action seeking to bolster her claim of entitlement to the endowed chair. Although the identity of the holder of a prestigious teaching position may be of general interest to the community, it does not rise to the level of public concern. *See Holbrook*, 112 F.3d at 1530 (plaintiff's pre-suit grievance alleging discrimination based on his disability is not a public concern); *Morgan*, 6 F.3d at 755 (plaintiff's claims tat she was retaliated against for complaining to internal officials about sexual harassment were not a public concern); *Badia v. City of Miami*, 133 F.3d 1443, 1446 (11th Cir. 1998) (noting that it is not clearly established in this circuit that an EEOC charge involving an otherwise purely personal matter is speech on a matter of public concern).

Norton cites no cases from this circuit in her brief supporting her claim and tries to distinguish *Grigley* from the instant case. In our view, *Grigley* is not distinguishable and the district court did not err in applying it.[2]

B.

Norton contends that the pre-termination proceedings she received did not provide due process because the decision makers were the very people whom she alleged unlawfully retaliated against her, and, as such,

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[2] The Defendants also asserted the defense of qualified immunity in their motion to dismiss. Because the district court found Norton's complaint failed to state a claim, it did not address the defense of qualified immunity. Likewise, because we agree with the district court's disposition of this case, we decline to consider the qualified immunity defense.

were biased. Norton argues that she was a tenured professor, and, therefore, possessed a property interest in continued employment entitling her to due process before she could be terminated. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 1491-92 (1985).

This circuit has made it clear that a state created property interest is protected by procedural, but not substantive, due process. *McKinney v. Pate*, 20 F.3d 1550, 1559 (11th Cir. 1994) (en banc) (when an individual asserts that his particular hearing was not fair and impartial, he has raised only procedural due process concerns). In *McKinney*, we acknowledged the Supreme Court's holding in *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982), that plaintiffs need not exhaust state remedies before bringing Section 1983 actions in federal court, and held that because the plaintiff chose not to pursue an available, adequate remedy in the state system, no procedural due process violation occurred. *McKinney* at 1564, n.20. Thus, the district court correctly determined that the only issue in the instant case was whether Norton received the procedural due process to which she was entitled.

In sum, we agree with the district court's finding that because Norton had an adequate state remedy, but chose not to pursue it, no procedural due process violation occurred.

C.

The district court denied Norton's motion for leave to file a third amended complaint. The district court denied

her motion because Norton wanted to amend her complaint two months before the scheduled trial date and almost two and one half years after her second amended complaint had been filed. The district court found that Norton wanted to amend her complaint because she recently obtained new counsel and because new counsel believed that Norton was entitled to recover under three additional federal statutes. The district court found that those reasons were not adequate to overcome the extreme delay in this case and the resulting prejudice to the Defendants that would occur. After reviewing the record, we see no abuse of discretion in the denial of the motion for leave to file a third amended complaint.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SANDRA K. NORTON,

Plaintiff,

v.

CASE NO.
97-8014-CIV-HURLEY

THE BOARD OF REGENTS OF THE DIVISION OF UNIVERSITIES OF THE FLORIDA DEPARTMENT OF EDUCATION, ANTHONY JAMES CATANESE, RICHARD L. OSBORN, JAMES S. MALEK, DAVID ANDERSON, ONDINA FELIPE, CARLA I. COLEMAN, JEAN LOUIS BALDET, and LYNDA QUILLEN,

Defendants.

_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS
(Filed Dec. 30, 1998)

THIS CAUSE is before the court on defendants' motions to dismiss plaintiff's Second Amended Complaint, plaintiff's responses in opposition, and defendants' replies thereto.

PROCEDURAL BACKGROUND

Plaintiff has sued in five counts, naming nine defendants. Counts I and II are based on 42 U.S.C. § 1983 and are

brought against eight officials of Florida Atlantic University (the "FAU officials") in their individual capacities.[1] Complaint ¶¶ 45-61. Count III (Equal Pay Act), count IV (declaratory relief), and count V (breach of contract) are brought against the Florida Board of Regents (the "BOR") only. Complaint ¶¶ 62.80. The FAU officials each have moved to dismiss counts I and II, alleging some individual bases and two common grounds: failure to state a claim based on the First Amendment and qualified immunity. The BOR also has moved to dismiss, raising Eleventh Amendment immunity to each count against it. For the purposes of addressing the multiple arguments raised by these motions to dismiss, the court treats the FAU officials and the BOR as separate groups.

FACTUAL BACKGROUND[2]

In 1991, plaintiff, Dr. Sandra Norton, served as Dean of the College of Arts and Humanities of Florida Atlantic

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[1] The officials named as defendants are: Anthony Catanese, President; Richard Osborn, Provost; James Malek, Dean of the College of Arts and Humanities, David Anderson, Associate Dean of the College of Arts and Humanities, Ordina Felipe, General Counsel; Carla Coleman, Vice President of University Advancement; Jean Louis Baldet, Chair of the Department of Theater; and Lynda Quillen, Associate General Counsel.

[2] These facts are taken from plaintiff's Second Amended Complaint ("Complaint") filed February 25, 1998, and are presumed to be true for the purpose of resolving these motions to dismiss. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (court will not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts" that would entitle him to relief). To date, defendants have not filed answers.

University ("FAU"), a component of the Florida university system located in Boca Raton. When FAU received a substantial endowment funding, among other things, two professorships, plaintiff endeavored to become one of the endowed professors. In 1994, FAU appointed plaintiff to the position she desired. However, by 1996, FAU no longer recognized plaintiff as one of the endowed professors and terminated her employment altogether in March 1997. Plaintiff initially filed this action in January 1997, alleging retaliatory conduct by the FAU officials for having filed in 1996 a state court public records suit against FAU.[3] Subsequently, plaintiff amended her complaint to include her termination as part of the alleged pattern of unlawful retaliatory conduct and cited the filing of the instant action as part of the reason for such retaliation.

FAU OFFICIALS' MOTIONS TO DISMISS

I. Count 1 – 42 U.S.C. § 1983 – First Amendment Right to Petition

In count I, plaintiff asserts that the FAU officials engaged in numerous acts of harassment, culminating with her termination, in retaliation for having filed a

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[3] Plaintiff's public records action consisted of a petition for a writ of mandamus under the Public Records Act, Chapter 119, Florida Statutes, to force FAU to disclose certain documents relating to its stance on who held the endowed professorship to which plaintiff claimed entitlement. According to the Complaint, plaintiff was successful in obtaining an order forcing FAU to publicly release the documents she desired. (Complaint ¶ 29).

public records action in Florida state court against FAU and for the filing of this case. While plaintiff has not characterized her complaint as such, the court considers count I to be a claim for violation of her First Amendment right to petition the government for redress of grievances. U.S. CONST. amend. I. The right to petition includes within it the right of access to the courts. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972) (discussing the right of access to the courts in the prisoner context). The FAU official move to dismiss count I on the ground that plaintiff fails to state a First Amendment violation under 42 U.S.C. § 1983.

To be entitled to First Amendment protection in the right-to-petition context, the Eleventh Circuit requires that the petition at issue address a "public concern." *See Grigley v. City of Atlanta*, 136 F.3d 752, 753 (11th Cir.), *cert denied*, 119 S. Ct. 59 (1998). *Contra San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994) (holding that petition clause claims need not have an underlying public concern).[4] This means if plaintiff's public records suit and

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[4] The facts of the case at bar are remarkably similar to those in *San Filipo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994). There, a tenured professor at Rutgers University sued university officials alleging retaliation for previously filed law suits and grievances against the university. *See id.* at 434-35. Some of the law suits involved matters of public concern, while others concerned purely personal issues. For this setting, the Third Circuit rejected the public purpose/private purpose dichotomy and held that the act of filing a non-frivolous lawsuit itself was protected by the First Amendment's right to petition. *See id.* at 443 ("The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.") The court reached this conclusion while acknowledging that every other circuit that had considered the

the case at bar do not involve a public concern, then Section 1983 cannot be used as a vehicle for redress.[5] *See Grigley*, 136 F.3d 752.[6] Because the public concern requirement serves a gate-keeping function, it must be addressed first. *See Rankin v. McPherson*, 483 U.S. 378, 384 (1987) *citing Connick*, 461 U.S. at 146); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989) (adopting four-part test for analyzing speech claims when public employer takes adverse employment action against employee).

Whether an employee's speech addresses a matter of public concern turns on the employee's purpose in speaking, i.e., was the employee primarily speaking in his role

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issue held that a public employee who alleges that she was disciplined in retaliation for having filed a lawsuit against her employer did not state a claim under 42 U.S.C. § 1983 unless the lawsuit addressed a matter of public concern. *See id.* at 439-40.

[5] The Supreme Court has stated that in "the most unusual circumstances" the First Amendment will protect speech that does not involve a public concern. *See Rankin v. McPherson*, 483 U.S. 378, 384 N.7 (1987) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)). However, the Court did not explain what these unusual circumstances might be, and the parties in this case have not argued that plaintiff's claims belong in this extraordinary category.

[6] This court is obligated to follow and apply precedent established by the United States Court of Appeals for the Eleventh Circuit. *See C.G. Willis, Inc. v. Director, Office of Workers Compensation Programs*, 31 F.3d 1112, 1116 n.8 (11th Cir. 1994). In this instance, the controlling decision is *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir.), *cert. denied*, 119 S. Ct. 59 (1998). Were this court free to write on a clean slate, however, it would follow the Third Circuit's approach in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994).

as citizen or his role as employee. *See Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993) (per curiam); *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988). To determine the employee's purpose, courts consider the "content, form, and context" of the speech. *Connick*, 103 S.Ct. at 1690; *Bryson*, 888 F.2d at 1565. This speech test also applies to right-to-petition claims. *See Grigley*, 136 F.3d at 755; *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir. 1997).

Plaintiff admits she filed the public records request to obtain documents that would support her claim to the endowed professorship. (Complaint ¶¶ 27,48). Nonetheless, plaintiff contends she meets the public concern requirement for two reasons. First, she argues the act of petitioning itself is a public act and, therefore, raises a public concern because allowing retaliation for filing suit would chill exercise of the right of access to the courts. Second, she contends that because the Florida Constitution, Article I, § 24, grants "[e]very person . . . the right to inspect or copy any public record made or received in connection with the official business of any public body," her public records action necessarily implicated public concerns.[7] The FAU officials counter that the act of petitioning itself is not sufficient, arguing the underlying subject matter, i.e., the documents themselves, must address a public concern.

While the form (filing law suits against a public entity) of plaintiff's First Amendment claim concerns the

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[7] Florida has a strong public policy favoring disclosure of government documents. *See, e.g., Tribune Co. v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986).

public, the content and context of her petitions are purely personal. Plaintiff filed the public records action to advance her claim of entitlement to the endowed professorship; she filed the instant suit hoping to protect herself from the alleged retaliation triggered by the public records action. Although the identity of the holder of a prestigious teaching position at a public university may well be of general interest to the community, it does not rise to the level of a public concern. *Cf. Holbrook*, 112 F.3d at 1530 (plaintiff's pre-suit grievance alleging discrimination based on his disability is not a public concern); *Morgan*, 6 F.3d at 752-53 (plaintiff's claims that she was retaliated against for complaining to internal official bodies about sexual harassment in the workplace were not matters of public concern); *Badia v. City of Miami*, 133 F.3d 1443 (11th Cir. 1998) (per curiam) (plaintiff's filing of EEOC charge and federal discrimination complaint did not constitute a public concern). For expression to be protected, its purpose must be to raise issues of public concern, not merely to further one's own interest in employment. *See Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998) (per curiam) (summary judgment granted to sheriff when he fired police officer allegedly in retaliation for filing an automobile accident report that was critical of another officer because such speech did not raise a public concern); *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997); *Ford*, 6 F.3d at 754-55. Here, plaintiff's petitions were made primarily to further private interests regarding her status at FAU, even though Florida law provided her access to the records as "public documents." Further, the Eleventh Circuit specifically foreclosed plaintiff's argument that the act of petitioning is

itself a matter of public concern. *See Grigley*, 136 F.3d at 755-56. Therefore, plaintiff's suits do not raise a public concern, and she fails to state a claim for violation of the First Amendment through 42 U.S.C. § 1983.

Because the court rules that plaintiff fails to state a claim in count I, the court need not and does not address the FAU officials claim to qualified immunity.

II. Count II – 42 U.S.C. § 1983 – Fourteenth Amendment Right to Due Process

In count II, plaintiff contends that the pre-termination proceedings she received did not provide due process because the decision-makers were the very people whom she alleged were unlawfully retaliating against her and, as such, were biased.[8] Because plaintiff was a tenured professor at FAU, she possessed a property interest in continued employment and was entitled to due process before she could be terminated. *See Cleveland Bd. of Educ. v. Loudermill*, 407 U.S. 532, 538-39 (1985). However, the Eleventh Circuit has made clear that a state-created property interest is protected by procedural, but not substantive, due process. *See McKinney v. Pate*, 20 F.3d 1550, 1559 (11th Cir. 1994) (When "an individual asserts that his particular hearing was not fair and impartial, he has raised only procedural due process concerns."). Thus the only issue is whether plaintiff received the procedural due process to which she was constitutionally entitled.

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[8] For purposes of this motion to dismiss, the court assumes the decision-makers were biased. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In *McKiney*, the plaintiff, a county employee who could only be fired for cause, was terminated after facially valid hearings before allegedly biased decision-makers. *See id.* at 1554-55. The plaintiff could have requested review of that decision by the Florida Courts, but instead sued in federal court, alleging due process violations pursuant to 42 U.S.C. § 1983. *See id.* at 1563 (citing Florida cases for the proposition that Florida courts have the power to review employment termination cases). Although acknowledging the Supreme Court's holding in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that plaintiffs need not exhaust state remedies before bringing Section 1983 actions in federal court, *see id*, at 1564 n.20, the court held that because the plaintiff chose not to pursue "an available, adequate remedy in the state system," no procedural due process violation occurred. *Id.* at 1563-64.[9] In other words, the process due when Florida withdraws a state-created right from an employee, *e.g.*, by terminating employment, is state court review of the termination decision. *See id.*

Here, as in *McKinney*, plaintiff had available an adequate state remedy. She admits she could have requested

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[9] Without analysis, plaintiff asserts that to the extent the *McKinney* opinion is inconsistent with *Patsy v. Board of Regents*, 457 U.S. 496 (1982), *Patsy* controls. Pl.'s Mem. in Resp. at 9. The court concedes that *McKinney* added some sort of state exhaustion requirement for due process claims that seems antagonistic to *Patsy*. However, the Eleventh Circuit's opinion dealt with one class of Section 1983 cases (procedural due process), while the Supreme Court's opinion discussed Section 1983 suits in general. Further, the Eleventh Circuit's interpretation of *Patsy* as it applies to pretextual termination suits, like the case at bar, binds this court.

administrative review by the state under Fla. Stat. § 120.57, but chose to sue in federal court instead. Pl.'s Mem. in Resp. at 7-8. Plaintiff had available all the process she was due. *See McKinney*, 20 F.3d at 1563-64. Therefore, no procedural due process violation occurred.

BOARD OF REGENTS' MOTION TO DISMISS

III. Count III – Equal Pay Act Claim

In count III, plaintiff alleges she was compensated at a rate lower than that of male scholars performing substantially similar duties in violation of the Equal Pay Act, 20 U.S.C. § 206 *et seq.* ("EPA").[10] Under the eleventh Amendment, states are immune from citizen suits in federal court. *See Hans v. Louisiana*, 134 U.S. 1 (1890).[11] As

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[10] The Equal Pay Act prohibits an employer from paying a person of one gender less than that of another for equal work, except that pay may be different when based on a seniority system, a merit system, a system based on quantity or quality of production, or any factor other than gender. 29 U.S.C. § 206(d)(1) (1978).

[11] The Eleventh Amendment states: "The Judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State." Since 1890, the Supreme Court has "understood the Eleventh Amendment to stand not so much for what is [sic] says, but for the presupposition of our constitutional structure which it confirms:" that the states are sovereign and may not be haled into a federal tribunal by private parties. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). Although this principle of immunity seemed to have been firmly decided over one-hundred years ago in *Hans*, that case and its broad

plaintiff concedes, the BOR is a Florida state agency. Complaint ¶ 3; *see* Fla. Stat. § 120.52 (defining the BOR as a state agency for purposes of the Florida Administrative Procedure Act); *Shands Teaching Hosp. & Clinics, Inc. v. Lee*, 478 So.2d 77 (Fla. Dist. Ct. App. 1985). As a state agency, the BOR raises the defense of Eleventh Amendment immunity. Because the Eleventh Amendment is tantamount to a federal jurisdictional bar, it must be addressed first. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1122 (1996).

Generally, the Eleventh Amendment protect states from suit in federal court. However, two exceptions to immunity exist: (1) the state may consent to being sued; and (2) Congress may abrogate the immunity. *See Seminole Tribe*, 116 S. Ct. at 1122-23. The parties agree that Florida has not waived its Eleventh Amendment immunity. Therefore, to survive BOR's motion to dismiss, plaintiff must establish that Congress abrogated the states' immunity with regard to claims under the EPA.

Although the Eleventh Circuit has not spoken to this issue,[12] three federal appellate courts have squarely (and

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interpretation of the Eleventh Amendment has, as of late, been questioned. *Compare* the majority and dissenting opinions in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (5-4 decision). In dissent, Justice Souter persuasively argues the Eleventh Amendment was never meant to immunize states from suit in federal court on federal questions. *See id.* at 1145. This court notes this ideological split merely to suggest that, today, state immunity from suits based on federal questions is not sacred, as it was once thought to be.

[12] The Eleventh Circuit has considered whether Congress abrogated the states' immunity with regard to claims under the

recently) addressed the issue of abrogation under the EPA. *See Ussery v. Louisiana*, 150 F.3d 431 (5th Cir. 1998) (concluding Congress abrogated states' immunity for EPA claims); *Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998) (same); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833 (6th Cir. 1997) (same). Only one district court in the Eleventh Circuit has addressed the issue. *See Larry v. Board of Trustees of the Univ. of Alabama*, 975 F.Supp. 1447 (N.D. Ala. 1997).[13] That court ruled that Congress has not abrogated the states' immunity from EPA claims; however, it did not have the benefit of the opinions in *Ussery* or *Varner* because they were issued after the decision in *Larry*. *See id.*

In 1996, the Supreme Court set forth the test for determining whether Congress properly abrogated the states' Eleventh Amendment immunity from suits under particular statutes. *See Seminole Tribe*, 116 S. Ct. 1114 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA") and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("ADA"), holding that the states retained their immunity from ADEA claims, but were amenable to suit under the ADA. *See Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998). The *Kimel* panel did not agree on a common rationale for its holding; rather, each judge authored a separate conflicting opinion. *See id.*

[13] In dicta, the Northern District of Florida touched on Congress' ability to abrogate the states' immunity, stating "the EPA was enacted for the distinct purpose of eradicating wage discrimination between the genders, a classic example of class-based differentiation prohibited by the Equal Protection Clause of the Fourteenth Amendment." *Walden v. Florida Dept. of Corrections*, 975 F.Supp. 1330, 1333 (N.D. Fla. 1996).

(1989)). Abrogation is proper only if Congress both unequivocally expresses its intent to abrogate the immunity and acts pursuant to a valid exercise of power. *Id.* at 1123.

A. Intent to Abrogate

In 1963, Congress amended the Fair Labor Standards Act, 29 U.S.C. § 201-19 ("FLSA") by adding the EPA. *Varner*, 150 F.3d at 709. At that time, the states' immunity was still intact. *See id.* at 710. In 1974, congress amended the FLSA, expanding the definitions of "employer" and "employee" to include public agencies and persons "employed by a State," respectively, and allowing suits against any employer, "including a public agency." *Id.* at 710 (quoting 29 U.S.C. §§ 203(d), (e)(2)(C), & 216(b)). This court holds, as three circuit courts of appeals have held, that the 1974 expansion of the FLSA sufficiently showed Congress' intent to abrogate the states' Eleventh Amendment immunity. *See Varner*, 150 F.3d at 710; *Ussery*, 150 F.3d at 435; *Timmer*, 104 F.3d at 837-38.

B. Power to Abrogate

After *Seminole Tribe*, the only valid way to abrogate the states' immunity is for Congress to act under the power of Section 5 of the Fourteenth Amendment. 116 S. Ct. at 1125-26. The "power" prong is divided into two subparts: whether Congress had the ability to abrogate the states' immunity from claims under the particular statute and, if so, whether Congress exercised that power.

See Varner, 150 F.3d at 711-12. The Seventh Circuit's reasoning on these subparts, as articulated in *Varner*, is persuasive.

The *Varner* court discusses at length the Supreme Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), which held the Religious Freedom Restoration Act unconstitutional because it went beyond Congress' Fourteenth Amendment power to enforce established constitutional rights. *See id.* at 715-16. The defendant in *Varner*, like the BOR, relied on *City of Boerne* and argued that Congress went beyond its power in enacting the EPA because the Fourteenth Amendment prohibits intentional discrimination, while an employer can violate the EPA without intentionally discriminating. *See id.* at 714, 716.[14] The court eventually rejected this argument, holding that the EPA was a proportional response to historical gender discrimination in employment and provides sufficient opportunity for employers to justify their seemingly discriminatory conduct. *Id.* at 716-17. Therefore, the Seventh Circuit held that congress had the power to abrogate the states' immunity from suit under the EPA. *Id.* at 717; *accord Timmer*, 104 F.3d at 838-39.

The BOR forcefully argues that even if Congress had the power to abrogate under the Fourteenth Amendment, Congress did not act pursuant to that power when it enacted the EPA. *See* BOR's Motion to Dismiss at 5, 7

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[14] This argument persuaded the Northern District of Alabama to rule that Congress did not validly abrogate the states' immunity with regard to EPA claims. *See Larry v. Board of Trustees of the Univ. of Alabama*, 975 F.Supp. 1447, 1449-50 (N.D. Ala. 1997).

(arguing the EPA was based solely on the Commerce Clause and courts should not invent an equal protection basis for it). While it is without question that Congress enacted the FLSA pursuant to its commerce power, *see* 29 U.S.C. § 202, it is not clear that the 1974 amendments extending the EPA to the states were equally limited. *See Timmer*, 104 F.3d at 838 N.7; *see also Varner*, 150 F.3d at 714 (calling legislative history of the EPA "murky"). It would be inconsistent to admit that Congress intended to abrogate the states' immunity, and that it had the power to so abrogate, but that it nevertheless failed to accomplish its mission because it did not recite the words "Fourteenth Amendment." Magic words need not be invoked for legislation to be effective. *See Kimel*, 139 F.3d at 1433 n.15, 1435-36 (J. Edmonson and C.J. Hatchett agreeing in principle that magic words are not needed to abrogate states' immunity); *Doe v. Univ. of Illinois*, 138 F.3d 653, 678 (7th Cir. 1998) (Easterbrook, J., respecting the denial of rehearing en banc) ("Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons").

Following in the path of the Fifth, Sixth, and Seventh Circuits, this court concludes that Congress possessed the power under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity from claims under the EPA, and Congress exercised that power when it amended the EPA through the FLSA in 1974. Therefore, plaintiff's EPA claim (count III) is not barred by the Eleventh Amendment.

IV. Counts IV & V – Declaratory Relief and Breach of Contract

In count IV, plaintiff asks the court to declare that BOR breached her employment contract and that she is one of the endowed professors. (Complaint ¶ 74). In count V, plaintiff requests damages from BOR for breaching her employment contract. (Complaint ¶ 78). These counts vary only in the form of relief requested. Plaintiff contends the court has supplemental jurisdiction over these state law claims based on 28 U.S.C. § 1367.

Whether the court has discretion to retain supplemental jurisdiction over state law claims is irrelevant to whether those claims can survive a motion to dismiss based on Eleventh Amendment immunity. *See Penhurst State School & Hop. v. Halderman*, 465 U.S. 89, 106 (1984). The general rule of immunity under the Eleventh Amendment plainly applies to state law claims brought in federal court, regardless of the type of relief sought. *See id.* Just last year the Supreme Court applied the Eleventh Amendment to bar a breach of contract claim brought in federal court against the Board of Regents of the State of California. *See Regents of the Univ. of California v. Doe*, 117 S. Ct. 900 (1997). Thus, the Eleventh Amendment prevents plaintiff from bringing counts IV and V in federal court.[15]

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[15] The court's holding on counts IV and V does not necessarily bar plaintiff from filing a breach of contract action against the BOR in state court. *See, e.g., Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So.2d 4 (Fla. 1984).

DECRETAL PROVISIONS

Accordingly, it is hereby **ORDERED AND ADJUDGED** THAT:

1. Defendant FAU officials' Motions to Dismiss [DE##78,85,86,92,99,107,&109] are **GRANTED**. Counts I and II are **DISMISSED**.

2. Defendant BOR's Motion to Dismiss [DE #91] is **DENIED** as to count III and **GRANTED** as to counts IV and V. Counts IV and V are **DISMISSED**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 29th day of December, 1998.

/s/ Daniel T.K. Hurley
Daniel T.K. Hurley
United States District Judge

Copy furnished to:
-Susan M. Seigle, Esq.
-Joseph Ackerman, Jr., Esq.
-William R. Scherer, Esq.
-John D. Gronda, Esq.
-Henry Latimer, Esq.
-Stephen F. Radford, Jr., Esq.
-Michael B. Davis, Esq.
-Don Stephens, Esq.
-Donna DiChiara, Attorney General
-Lynda Quillen, Esq.
-Paul T. Ryder, Esq.
-Carrie S. Leininger, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SANDRA K. NORTON,

Plaintiff,

v.

CASE NO.
97-8014-CIV-HURLEY

THE BOARD OF REGENTS OF THE DIVISION OF UNIVERSITIES OF THE FLORIDA DEPARTMENT OF EDUCATION, ANTHONY JAMES CATANESE, RICHARD L. OSBURN, JAMES S. MALEK, DAVID ANDERSON, ONDINA FELIPE, CARLA I. COLEMAN, JEAN LOUIS BALDET, and LYNDA QUILLEN,

Defendants.
_____ /

FINAL JUDGMENT
(Filed June 1, 2000)

THIS CAUSE is before the court upon plaintiff's motion for entry of final judgment and defendant Board of Regents response indicating it has no objection. Of plaintiff's original five counts, the court dismissed with prejudice counts I, II, IV and V. Plaintiff voluntarily dismissed with prejudice count III. Therefore, it is now appropriate to enter final judgment. Pursuant to Federal Rule of Civil Procedure 58(2), it is hereby

ORDERED and ADJUDGED

1. Final judgment is entered in favor of defendants The Board of Regents of The Division of Universities of The Florida Department of Education, Anthony James Catanese, Richard L. Osburn, James S. Malek, David Anderson, Ondina Felipe, Carla L. Coleman, Jean Louis Baldet, and Lynda Quillen, and against plaintiff Sandra K. Norton on all counts. Plaintiff shall take nothing, and defendants shall go hence without day.

2. The court reserves jurisdiction to award costs and attorney's fees as appropriate.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 31st day of May, 2000.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copy furnished to:
M. Kate Boehringer, Esq.
Joseph Ackerman, Jr., Esq.
William R. Scherer, Esq.
Henry Latimer, Esq.
Stephen F. Radford, Jr., Esq.
Michael B. Davis, Esq.
Don Stephens, Esq.
Donna DiChiara, Attorney General
Lynda Quillen, Esq.
Paul T. Ryder, Esq.
Carrie S. Leininger, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13486-GG

SANDRA K. NORTON, Ph. D.,

Plaintiff-Appellant,

versus

FLORIDA ATLANTIC UNIVERSITY,

Defendant,

ANTHONY JAMES CATANESE,
RICHARD L. OSBURN, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

(Filed Oct. 26, 2001)

BEFORE: EDMONDSON, DUBINA and POLITZ*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Sandra K. Norton is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

---

* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13486-GG

SANDRA K. NORTON, Ph. D.,

Plaintiff-Appellant,

versus

FLORIDA ATLANTIC UNIVERSITY,

Defendant,

ANTHONY JAMES CATANESE,
RICHARD L. OSBURN, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

(Filed Oct. 26, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONDSON, DUBINA and POLITZ*, Circuit Judges.

---

* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SANDRA K NORTON, Ph.D.,

Plaintiff,

THE BOARD OF REGENTS OF THE DIVISION OF UNIVERSITIES OF THE FLORIDA DEPARTMENT OF EDUCATION, ANTHONY JAMES CATANESE, Ph.D., RICHARD L. OSBURN, JAMES S. MALEK, Ph.D. DAVID ANDERSON, ONDINA FELIPE, CARLA L. COLEMAN, JEAN LOUIS BALDET, and LYNDA QUILLEN,

Defendants.
_____/

CASE NO.: 97-8014-CIV-HURLEY
MAGISTRATE JUDGE LYNCH

Florida Bar Number 608017

SECOND AMENDED COMPLAINT

Plaintiff, SANDRA K NORTON, Ph.D. ("Dr. Norton"), sues Defendants, THE BOARD OF REGENTS OF THE DIVISION OF UNIVERSITIES OF THE FLORIDA DEPARTMENT OF EDUCATION ("the Board"), ANTHONY JAMES CATANESE, Ph.D. ("Catanese"), RICHARD L. OSBURN ("Osburn"), JAMES S. MALEK, Ph.D. ("Malek"), DAVID ANDERSON ("Anderson"), ONDINA FELIPE ("Felipe"), CARLA L. COLEMAN ("Coleman"), JEAN LOUIS BALDET ("Baldet") and LYNDA QUILLEN ("Quillen"), and alleges as follows:

GENERAL ALLEGATIONS

1. This is an action for declaratory and injunctive relief and damages. Jurisdiction is founded on 28 U.S.C. § 1331 inasmuch as the causes of action arise under the laws of the United States, particularly Section 1 of the Ku Klux Klan Act of 1879, 42 U.S.C. § 1983 (Counts I and II), the Equal pay Act of 1963, 20 U.S.C. § 206 et seq. (Count III); and for declaratory relief pursuant to 28 U.S.C. § 2201(a).

2. Plaintiff, Dr. Norton, is a female citizen of the United States who resides in Palm Beach County, Florida.

3. Defendant, the Board, is an agency of the State of Florida and is responsible for the acts of state universities within the state university system, including but not limited to Florida Atlantic University ("the University"), which is a public university operated by the Board, with its main campus located in Boca Raton, Palm Beach County, Florida. This Court has jurisdiction to entertain Count III, for damages, against the Board by virtue of the provisions of 20 U.S.C. § 203(s)(1)(B).

4. Catanese is president of the University, is subject to the jurisdiction of this Court, and is sued in his individual capacity.

5. Osburn holds the office of Provost and Chief Academic Officer of the University, is subject to the jurisdiction of this Court, and is sued in his individual capacity.

6. Malek holds the office of Dean of the College of Arts and Humanities of the University, is subject to the

jurisdiction of this Court, and is sued in his individual capacity.

7. Anderson holds the office of Associate Dean of the College of Arts and Humanities of the University, is subject to the jurisdiction of this Court, and is sued in his individual capacity.

8. Felipe holds the office of General Counsel to the University, is subject to the jurisdiction of this Court, and is sued in her individual capacity.

9. Coleman holds the office of Vice President of University Advancement at the University, is subject to the jurisdiction of this Court, and is sued in her individual capacity.

10. Baldet is the Chairman of the Department of Theater at the University, is subject to the jurisdiction of this Court, and is sued in his individual capacity.

11. Quillen is an associate counsel of the University, is subject to the jurisdiction of this Court, and is sued in her individual capacity.

12. In 1991, the late Charles E. Schmidt, a local philanthropist, made a gift of $5,000,000 to the University for the purpose of constructing and equipping an Arts and Humanities Building on its main campus. At the same time, he pledged an additional gift of $5,000,000 to fund two endowed chairs at the University, to be denominated Superchair I and Superchair II. The gifts were to be matched on a dollar to dollar basis by funds from the State of Florida, and were so matched. Each superchair was to be equally funded by the interest accruing on a second gift, which was made pursuant to the Florida

Endowment Trust Fund for Eminent Scholars. True and correct copies of correspondence between Charles E. Schmidt and the University establishing these gifts are attached hereto as Composite Exhibit A. These two gifts represent the largest cash grant to an academic program ever received in the history of public education in Florida.

13. At the time of the gifts described in the preceding paragraph, Dr. Norton was employed by the University as Dean of the College of Arts and Humanities. She was acknowledged by the University, through its president, Catanese, to be the "key player" in obtaining the gifts described in paragraph 4. A true and correct copy of correspondence from President Catanese to Plaintiff is attached hereto as Exhibit B.

14. The Arts and Humanities Building which was funded by the first $5,000,000 gift and matching state funds was constructed on the campus of the University, and was named The Dorothy F. Schmidt Center in honor of the late wife of Charles E. Schmidt. Dr. Norton was involved in the design and oversight of the construction of said building, with the knowledge, acquiescence and encouragement of the University.

15. In 1994, after the second $5,000,000 gift was fully funded, the University entered into a contract with Dr. Norton which appointed her as an Eminent Scholar to occupy Superchair II. Dr. Norton had previously indicated her intention to resign as Dean of the College of Arts and Humanities, and subsequently was offered the appointment to Superchair II and the position as Schmidt

Professor and Director of the Schmidt Institute for Comparative Studies. Her work as Schmidt Professor and Director of the Institute was to be supported by the funds accruing to Superchair II. A true and correct copy of the contract is attached hereto as Exhibit C. It was understood and expected, by Dr. Norton and officials of the University, that the new dean of the College of Arts and Humanities was to control the funds accruing to Superchair I.

16. On July 15, 1994, the University issued a press release, notifying the public that Dr. Norton had been appointed to occupy Superchair II as an Eminent Scholar. A true and correct copy of the press release is attached hereto as Exhibit D. The information contained in the press release was published in The Fort Lauderdale Sun-Sentinel and in The Boca Raton News. True and Correct copies of those articles is attached hereto as Exhibit E. The University further publicized this appointment in August, 1994, by an article in Update, the University's newsletter. A true and correct copy of the article is attached hereto as Exhibit F.

17. Dr. Norton began her occupancy of Superchiar II in January, 1995, and after consultation with Charles E. Schmidt and his present wife, Catherine, developed and implemented a program in comparative studies, with particular emphasis on recognizing and supporting women scholars, artists and students. The program was, and is, the only program in the College of Arts and Humanities of the University specifically dedicated to recognizing and supporting women, and which encouraged study in a

second language, in recognition of the increasing internationalism that is vital to the arts and economics of South Florida and the nation at large.

18. The University reported to the State of Florida, on an annual report, that Dr. Norton was the Eminent Scholar who occupied Superchair II, and further reported that her assigned activities included further development of the Schmidt Institute of Comparative Studies. A true and correct copy of the report is attached hereto as Exhibit G.

19. In the summer of 1995, after occupying Superchair II for one-half year, Dr. Norton submitted a budget outlining expenditures for the upcoming academic year for Superchair II. The budget was approved on June 20, 1995. A true and correct copy of correspondence to Dr. Norton approving the proposed budget is attached hereto as Exhibit H. During the 1995-96 academic year, Dr. Norton was able to bring many distinguished scholars and artists to the University to fulfill the mission of the Institute for Comparative Studies in accordance with the wishes of Charles E. Schmidt, including but not limited to Francoise Gilot, Yevgeny Yevtushenko, Elena Poniatowska, Nelida Piñon and Maria Victoria Atencia.

20. After Dr. Norton resigned as Dean of the College of Arts and Humanities and took occupancy of Superchair II, the deanship was filled on an interim basis by John Dowling, Ph.D. Subsequently, Malek was named the new dean of the College of Arts and Humanities, and as occupant of Superchair I.

21. In early 1996, an unflattering article appeared in a Palm Beach County newspaper, questioning some of the

expenditures made by Dr. Norton as Eminent Scholar and occupant of Superchair II. In response, the University, through Osburn, wrote to the editor of the paper, stating that all expenditures made by Dr. Norton were both supervised and approved. A true and correct copy of that correspondence is attached hereto as Exhibit 1. In the article, the donor, Charles E. Schmidt, was fully supportive of the program instituted by Dr. Norton.

22. A review of the expenditures of Dr. Norton was performed in April, 1996, by internal accountants of Florida Atlantic University. The review revealed no irregularities in the expenditures.

23. After the unflattering article appeared, Malek, who was jealous of the professional accomplishments of Dr. Norton as Eminent Scholar and occupant of Superchair II, saw his opportunity for a "power-grab." Under the guise of needing to reallocate funds due to inclusion of new programs in the College of Arts and Humanities, Malek refused to approve Dr. Norton's budget for the 1996-97 academic year, and instead, reallocated more than one-half of the funds accruing to Superchair II for his own use as dean. Malek did not disturb the funds of any endowed positions occupied by a male in the College of Arts and Humanities, of which but one are occupied by males. The only program disturbed was the one program in the College of Arts and Humanities specifically dedicated to the support of women scholars, artists and students.

24. Although a dean has the power to review the budget of an Eminent Scholar in terms of fiscal responsibility, Eminent Scholars have full discretionary use of

the funds accruing to their endowed chair. *See* page 2 of Exhibit J, attached hereto, outlining the financial responsibility of an Eminent Scholar.

25. The University subsequently took the position that Dr. Norton had not been appointed to Superchair II, and further, in order to mollify Charles E. Schmidt and his family, who were outraged by the modification in the budget and the intentions expressed by Malek for the use of the funds, contended that there needed to be a search in order to appoint an Eminent Scholar to the chair. *See* correspondence from Catanese to Charles E. Schmidt, dated April 29, 1996, attached hereto as exhibit K. Malek's proposed use of the funds was in direct contradiction of the intent of the donor, and was further in violation of State of Florida statute and regulation by virtue of the contraindication of the donor.

26. There is no statutory requirement for a search to be formally undertaken to fill an Eminent Scholar position. The actions taken by the University are in violation of law and of its contractual responsibility to Dr. Norton, and violate her right to a fair hearing before removing her from an employment position.

27. Over several months thereafter, Dr. Norton attempted unsuccessfully to obtain documents from the University to substantiate the position taken by the University that she was not the occupant of Superchair II. After the University's continued refusal to comply with proper public records requests, Dr. Norton was forced to file a petition for writ of mandamus to force compliance.

28. Dr. Norton retained the law firm of Rivas & Rivas for purposes of obtaining public records from the

University. Florence Snyder Rivas, the managing partner of the firm, held the position of adjunct professor at the University, and was scheduled to teach a class in communications law during the fall semester of 1996. When the firm of Rivas & Rivas first made a formal public records request on behalf of Dr. Norton, Catauese and Felipe, acting in concert and for the purpose of harassing and intimidating Dr. Norton, summarily terminated Mrs. Rivas from her position as adjunct professor. These actions were the beginning of a conspiracy by officials of the University to retaliate against Dr. Norton for exercising her legal right of access to public documents.

29. After Dr. Norton was successful in obtaining an order requiring compliance, the University, through Coleman, issued a press release, notifying the world that Dr. Norton did not occupy Superchair II, and announcing searches for both chairs. A true and correct copy of the press release is attached hereto as Exhibit L. The act of issuance of the press release was one of the acts undertaken to retaliate against Dr. Norton for the exercise of her right of access to public documents, as more fully described below. Notwithstanding the refusal of the University to release documents to Dr. Norton, once she was successful in obtaining a writ of mandamus, the University released additional documents to the press which were protected from disclosure by the confidentiality provisions of the Florida Administrative Code.

30. On September 16 and September 17, 1996, as a direct result of Dr. Norton's obtaining the relief described above, Catanese, Osburn, Malek, Anderson, Felipe and Coleman, acting in their official capacities with the University, held meetings during which time each member of

the conspiracy was assigned his or her respective tasks, and each member agreed to undertake his or her assignment to continue to retaliate against Dr. Norton for the exercise of her rights for access to public documents as well as her First Amendment right to seek redress of grievances in a court of law. Catanese, as president of the University, ordered and approved each act done in furtherance of the conspiracy. Felipe, as general counsel to the University, approved and condoned each act done in furtherance of the conspiracy. Such acts included, but were not limited to,

a. on September 17, 1996, seizing books and records contained in Dr. Norton's office, notwithstanding the fact that all such records were readily available in at least two other offices;

b. posting a police guard at Dr. Norton's office to report and note every person who entered or left the office, an action not taken against any other professor, director, eminent scholar or other member of the faculty at the University, which action was intended to humiliate and embarrass Dr. Norton in front of her colleagues and students;

c. threatening to fire her on September 18, 1996, if she did not sign a certain employment contract, notwithstanding the fact that many other faculty members likewise were not forced to sign similar employment contracts, as set forth in Exhibit M, a true and correct copy of a memorandum from Osburn to Dr. Norton, dated September 18, 1996;

d. embarking on a "witch-hunt" to attempt to uncover financial irregularities, notwithstanding the

results of the financial review performed in April, 1996 and notwithstanding Osburn's prior statements that all such expenditures were supervised and approved;

e. otherwise attempting to embarrass and humiliate her in front of her colleagues and students.

31. In January, 1997, after this lawsuit was filed, Plaintiff was advised by her physician that she would need to have a surgical procedure performed. She notified Baldet, her department chairman, of the upcoming surgery, and requested that he have a substitute professor available to teach her class on January 27, in the event she had not recuperated sufficiently to teach the class. *See* Memorandum from Norton to Baldet, dated January 14, 1997, attached hereto as Exhibit N.

32. Dr. Norton was unable to teach the class on January 27, and informed Baldet of that fact the preceding Friday, as promised. She spoke with him again on January 29, and informed him that she was not recuperating with the speed she had anticipated. He informed her that they would play it "week by week", and that she would be required to prove her illness was valid because of the pending litigation, a requirement not made of other faculty members, and one that was in direct retaliation for her filing this suit.

33. On February 3, Dr. Norton learned from her physician that she had developed an infection, and that she may not be able to return to work for several weeks. She informed Baldet of the problem, and requested he have a substitute professor available.

34. Dr. Norton then informed Baldet, by memorandum dated February 17, 1997, of her anticipated return in two weeks. *See* Exhibit O, attached hereto. At that time, she submitted sick-leave forms delineating the dates and reasons for her prior absences in order to permit the personnel department to appropriately subtract the dates of absence from her accrued sick-leave.

35. Subsequently, notwithstanding the fact that the University knew that Dr. Norton would return in two weeks, on February 20, 1997, Quillen demanded that Dr. Norton submit a letter from her physician predicting when she would return, and that the letter be submitted by February 24, 1997. Dr. Norton was threatened with being found insubordinate if she did not comply. *See* Correspondence from Quillen to Susan M. Seigle, the undersigned counsel, attached hereto as Exhibit P. A demand of this sort has not been made of any other tenured professor at the University, and was being made in retaliation for her exercise of her First Amendment right to seek redress of grievances in not only the public records law suit, but also the instant law suit.

36. Due to concerns about continued retaliation, Seigle wrote to Quillen on February 21, 1997, requesting the specific authority which would permit the University to make such a request. *See* Exhibit Q, attached hereto. Although Quillen responded on February 23, 1997, she did not provide any citation to the authority for such a request. Further, notwithstanding the fact that Dr. Norton had told the University when she would return to work, Quillen's alleged basis for the unauthorized request was purportedly to learn when she would return. *See* Exhibit R.

37. Because Quillen failed to provide specific authority for the demand, Seigle responded on February 24, 1997, reiterating her request for the administrative rule or other authority permitting the University to demand a physician's prediction of when a tenured professor would return to work. *See* Exhibit S. In that correspondence, Seigle informed the University that Dr. Norton would be back to work the next week, as Dr. Norton had done in her February 17 memorandum. Quillen responded, citing an administrative code provision allegedly supporting the request. *See* Exhibit T. After review of the purported authority, Seigle responded, questioning the applicability of the cited provision, and again requesting authority for the request. *See* Exhibit U.

38. Quillen responded on February 24, now giving Dr. Norton a dead-line of February 26 to provide a physician prediction, and threatening job abandonment if one was not provided. *See* Exhibit V. Seigle responded to Joseph Ackerman, attorney for the University, enclosing Quillen's latest correspondence, and expressing her concern that the activities of the past days were a continuation of retaliatory conduct against Dr. Norton. *See* Exhibit W. After a telephone conversation to attempt to resolve the latest dispute, Seigle again wrote Ackerman, after receiving information that the decision had been made to terminate Dr. Norton's employment with the University because she had not acceded to the unreasonable and unauthorized demand she submit a physician's prediction of when she would return to work. *See* Exhibit X. On March 1, 1997, Ackerman responded, denying that the decision had been made to terminate Dr. Norton's employment. *See* Exhibit Y. In that correspondence,

Ackerman established yet another deadline for submission of a prediction as to when Dr. Norton would return to work, with the deadline being March 3, 1997. Seigle again responded, asking one more time for the authority for such a request. *See* Exhibit Z. Notwithstanding the multiple requests, the specific provision permitting such a request was never provided.

39. Dr. Norton returned to work, as promised, on March 3, 1997, reporting to the Theater Department office, and informing Baldet of her return. Because it was spring break, there was no class to teach on March 3. Instead, Dr. Norton picked up numerous student papers and other documents that were left in the department office for her review, and began the process of evaluating the work performed by her students in her absence. She additionally attended a conference on Thursday, March 6, with her students, which was one of her regularly scheduled professorial duties.

40. Notwithstanding her return to work, on Friday, March 7, 1997, Osburn delivered to Dr. Norton a notice of the intention of terminating her employment for failure to provide the unauthorized documentation. *See* Exhibit AA. No other faculty member has even [sic] been required to provide a physician's prediction of when they could return to work, and no other faculty member has ever been threatened with termination in the event of noncompliance.

41. The University has a grievance procedure established by Rule 6C5-5.011 of the Florida Administrative Code, which ostensibly provides "due process" and an administrative proceeding to attempt to resolve disputes

such as the one arising from the disagreement over sick-leave. The procedure involves informal meetings, the first nominated as a Step One meeting, and then a Step Two meeting if the results of the Step One meeting are unsatisfactory to the grievant. In order to attempt to resolve the dispute without resolving to legal action, Dr. Norton requested a Step One meeting, which was held on April 9, 1997. The meeting was chaired by James Fisher, the associate provost, who reports directly to Osburn, one of the defendants in this action, and as such, was not an impartial decision-maker. Malek, also one of the defendants in this action, attended the meeting, because he was Dr. Norton's supervisor, and thus was the person against whom a grievant such as Dr. Norton must complain. The Step One meeting was a sham, with Malek, Osburn, and the others involved in the process having no intention of attempting any meaningful resolution of the dispute. The Step One decision-maker found Dr. Norton's grievance to be without merit. *See* Step One decision, attached hereto as Exhibit BB.

42. Dissatisfied with the decision, Dr. Norton requested a Step Two meeting, which was held on May 1, 1997. The meeting was chaired by Ann Boykin, Ph.D., the dean of the college of nursing, and another person who reports directly to Osburn, and as such, was also not an impartial decision-maker. Malek similarly was present, and petulantly refused to provide Dr. Norton with any information regarding whether her return to work on March 3, 1997 was recognized as a valid return to work, describing her request for that information as "ridiculous". Within twenty-four hours of the meeting, notwithstanding the fact that Dean Boykin attended two

commencement ceremonies in the interim, a negative decision was rendered. *See* Exhibit CC. One of the bases for her negative decision was that Dr. Norton failed to establish that she had returned to work on March 3, and yet Malek himself, as well as the attorney representing the University at the meeting, had refused to provide a definition of what constituted "return to work". The actions of the University in providing "due process" through the grievance procedure were not in good faith, and were merely continued retaliatory actions against Dr. Norton for filing both the public records action and this law suit. The results were a foregone conclusion, and the "due process" afforded by the grievance process was a sham.

43. Although there is a Step Three to the grievance process, resorting to this as an administrative remedy would be futile, as the Step Three hearing officer is the President of the University, who is a defendant in this cause, or his designee, and is therefore not an impartial decision-maker. Additionally, prior to the time Dr. Norton had to elect to go to Step Three of the grievance process, Baldet removed her name from her mailbox at the University, indicating that the results of any Step Three hearing, just like the results of the Step One and Two hearings, was a foregone conclusion.

44. Dr. Norton has had a long and distinguished career as a professor and scholar. Her professional reputation has been shattered by the defendants' wrongful acts and has been destroyed by the retaliatory conduct, including the retaliatory termination, of the defendants. At the time these actions were taken, Dr. Norton was

fifty-four (54) years of age, and within ten (10) years of retirement.

COUNT I

VIOLATION OF CIVIL RIGHTS

45. Plaintiff incorporates paragraphs 1 through 44 as if fully set forth herein.

46. This is an action against Catanese, Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen, individually, pursuant to 42 U.S.C. § 1983, for violation of rights secured to the Plaintiff by the First Amendment to the United States Constitution.

47. Catanese, Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen, acted under color of state law in connection with all the matters alleged in this Second Amended Complaint.

48. Dr. Norton acted within the scope of protected First Amendment rights when she communicated with University officials to obtain documents from the University to substantiate the position taken by the University that she was not the occupant of Superchair II. She was similarly acting within the scope of said rights when she filed the petition for a writ of mandamus to require the University to comply with its obligations under the Public Records Act, Chapter 119, Florida Statutes, by providing her access to documents which the University unlawfully withheld, and was within the scope of said rights when she filed the initial complain [sic] in this action in early January, 1997.

49. Catanese, embarrassed and angry that a court determined that he unlawfully refused to provide public access to public records and ordered him to provide access to those public records, and further angry that he has been named in this lawsuit, conspired with Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen to continue the campaign of retaliation against Dr. Norton for having exercised her First Amendment-protected rights of free speech, to petition the government for redress of grievances, and to this [sic] bring litigation to assert her legal rights, as more fully described above.

50. Through Coleman, Catanese gratuitously caused the University's press release, attached hereto as Exhibit L, to engage in scurrilous name-calling about matters that had nothing to do with the subject of the press release, all in a petty effort to defame Dr. Norton, damage her professional reputation, and end her academic career.

51. Notwithstanding the financial review performed in April, 1996, Catanese, Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen caused books and records to be seized, guards to be posted, threatened to terminate Dr. Norton's employment, and did wrongfully terminate Dr. Norton's employment, in a concerted effort to make her life intolerable, and to force her to leave the University with her professional reputation and integrity falsely impugned and denigrated.

52. Baldet admitted that the demand that Dr. Norton submit a physician's note proving her illness was done in retaliation for this lawsuit, and the unauthorized demands were made by Baldet and Quillen with the

approval and consent of Catanese, Osburn, Malek, Anderson and Felipe.

53. In each and every one of these retaliatory actions and all of them combined, Catanese and the other defendants punished Dr. Norton for the exercise of her First Amendment rights, and thus deprived her of her right to be free from punishment for exercising such rights.

54. By their actions, Catanese, Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen have damaged Dr. Norton's professional reputation, caused her embarrassment and humiliation, and have caused her to be terminated from her employment in retaliation for her exercise of her First Amendment right to seek redress of grievances in a court of law.

55. The actions taken by the defendants were motivated by evil intent, or alternatively, involved reckless or callous indifference to the federally protected rights of Plaintiff, and justify an award of punitive damages.

56. Dr. Norton has been forced to hire counsel to bring this action to vindicate her rights under 42 U.S.C. § 1983. She is entitled to recover costs and a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

WHEREFORE, Dr. Norton prays for judgment:

(a) that Catanese, Osburn, Malek, Anderson, Felipe, Coleman, Baldet and Quillen, acting under color of state law, have deprived her of rights secured to her by the United States Constitution;

(b) for compensatory and punitive damages against Catanese, Osburn, Malek, Anderson, Felipe, Coleman,

Baldet and Quillen, individually, for violating Dr. Norton's civil rights; and

(c) for costs of this action, including reasonable attorney's fees, and for such other and further relief has [sic] this Court may deem just, proper and equitable.

COUNT II

DUE PROCESS VIOLATION

57. Plaintiff incorporates paragraphs 1 through 44 as if fully set forth herein.

58. As a tenured professor, Plaintiff has a protected property interest in continued employment at the University.

59. Defendants Catanese, Osburn, Malek, Anderson, Felipe, Baldet and Quillen were personally involved in, or alternatively acquiesced in, the deprivation of Plaintiff's protected property interest without adequate due process. The grievance procedure afforded to Plaintiff pursuant to Rule 6C5-5.011 is unconstitutional on its face, as it does not provide impartial decision-makers to decide any grievance filed thereunder. The grievance procedure is additionally unconstitutional as applied in this case, as those controlling the grievance process are among the very persons sued in this law suit in early January, 1997, and are thus not impartial.

60. The actions taken by the defendants were motivated by evil intent, or alternatively, involved reckless or callous indifference to the federally protected rights of Plaintiff, and justify an award of punitive damages.

61. Dr. Norton has been forced to hire counsel to bring this action to vindicate her rights under 42 U.S.C. § 1983. She is entitled to recover costs and a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

WHEREFORE, Dr. Norton prays for judgment:

(a) that Catanese, Osburn, Malek, Anderson, Felipe, Baldet and Quillen, acting under color of state law, have deprived her of rights secured to her by the United States Constitution;

(b) for compensatory and punitive damages against Catanese, Osburn, Malek, Anderson, Felipe, Baldet and Quillen, individually, for violating Dr. Norton's civil rights; and

(c) for costs of this action, including reasonable attorney's fees, and for such other and further relief has [sic] this Court may deem just, proper and equitable.

COUNT III

VIOLATION OF EQUAL PAY ACT

62. Plaintiff incorporates paragraphs 1, 2, 3, 12 through 19 and 44 as if fully set forth herein.

63. This action is brought pursuant to the Equal Pay Act of 1963, 20 USC § 206 et seq. The jurisdiction of this court is invoked to secure protection and redress deprivation of rights secured by federal law which provide relief against sex discrimination in employment practices.

64. . The University is an employer located within the City of Boca Raton, Florida, is an enterprise engaged in commerce pursuant to the provisions of 20 U.S.C.

§ 203(s)(1)(B), is within the jurisdiction of this Court, and employs two or more persons. The Board is responsible for the acts and/or omissions of the University.

65. Dr. Norton was employed by the University since January, 1995 as Eminent Scholar and occupant of Superchair II, as more fully described above. During the period of her employment, she has performed the duties of an eminent scholar at a rate less than that paid to male eminent scholars, directors, and distinguished professors, for performing the same or substantially similar job positions requiring equal skill, effort and responsibility under similar working conditions at the same establishment.

66. The differential rate of pay was and is not based on a seniority system, merit system, a system based on the quantity or quality of production or upon a factor other than sex. During the period of Dr. Norton's employment, the University was subject to the provisions of the Equal Pay Act.

67. Pursuant to the provisions of Florida Administrative Code Section 6C5-5.004, the University is required to do an annual evaluation of each faculty member based on his or her total performance in fulfilling responsibilities to the University. Merit raises in pay are based on said annual evaluations. Notwithstanding that obligation, since naming her eminent scholar, the University has failed to do an annual evaluation of Dr. Norton's performance, and has failed to provide her a raise in pay, which has not increased since she was Dean of the College of Arts and Humanities. Similarly situated male eminent scholars, directors and distinguished professors

have received evaluations and concomitant raises in salary.

68. The University is engaged in policies and practices of employment which willfully discriminate against Dr. Norton on the basis of her sex by paying her a lesser rate of pay that [sic] paid to male eminent scholars, directors and distinguished professors performing the same or substantially similar job duties which require equal skill, effort and responsibility, and under the same working conditions in the same establishment.

69. All of the above acts of the University violate 29 U.S.C. § 206 et seq.

70. Dr. Norton has been forced to hire counsel to bring this action to vindicate her rights under 29 U.S.C. § 206. She is entitled to recover costs and a reasonable attorney's fee pursuant to 29 U.S.C. § 216(b).

WHEREFORE, Dr. Norton prays for judgment:

(a) against the Board, because of the actions of the University, for the difference in pay between what she earned and what male eminent scholars, directors, and distinguished professors were paid by the University for performing job positions requiring similar skill, effort and responsibility during the period that Dr. Norton was employed by the University and to upgrade the female position equal in pay to the male position; and

(b) award Dr. Norton the costs of this action, including reasonable attorneys' fees, liquidated damages, prejudgment interest, and award such other and further relief that this Court may deem just, proper and equitable.

COUNT IV

DECLARATORY RELIEF

71. Plaintiff incorporates paragraphs 1, 2, 3, 12 through 26 and 44 as if fully set forth herein.

72. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201(a).

73. Based on the contract attached hereto as Exhibit C, Dr. Norton holds the position of Eminent Scholar as occupant of Superchair II. However, the recent actions of the University cause here to be in doubt as to existence of her status as the holder of that position.

74. The Board, by virtue of the actions of the University, and Dr. Norton have actual, present, adverse and antagonistic interests in this action, of sufficient immediacy and reality to warrant issuance of declaratory relief.

WHEREFORE, Plaintiff requests this court enter an order:

(a) declaring that she was properly and legally appointed as Eminent Scholar to occupy Superchair II pursuant to the contract attached as Exhibit C;

(b) declaring that the University, as agent of the Board, is estopped from conducting a search for Superchair II;

(c) declaring that Dr. Norton is the current occupant of Superchair II, and is entitled to the rights and duties inherent in being such an occupant; and

(d) for the costs of this action, including reasonable attorney's fees, and for such other and further relief that this Court may deem just, proper and equitable.

COUNT V

BREACH OF CONTRACT

75. Plaintiff incorporates paragraphs 1, 2, 3, 12 through 26 and 44 as if fully set forth herein.

76. This is an action for breach of contract.

77. All conditions precedent to the bringing of this action have occurred or have been performed or waived.

78. The University, as agent of the Board, has breached its contract with Dr. Norton by removing her from her position as Eminent Scholar and occupant of Superchair II.

79. By virtue of that breach, Dr. Norton's professional reputation has been damaged, and will continue to be damaged. Her ability to obtain a similar or superior appointment in the future has now been lost.

80. The Board is responsible for the breach of contract by its agent, the University.

WHEREFORE, Plaintiff prays that this Court assume jurisdiction over this pendent claim, as it arises under the same nucleus of operative fact as the claims set forth in Counts I, II and III, and demands judgment for damages against the University, for the costs of bringing this

action, and for such other and further relief as is deemed just in the premises.

CHAUNCEY & SEIGLE, P.A.
241 Bradley Place
Palm Beach, FL 33480
(561) 833-3001

By: /s/ Susan M. Seigle
Susan M. Seigle

CHARLES E. SCHMIDT • 486 COCONUT PALM ROAD • BOCA RATON, FLA

November 25, 1991

Dr. Anthony James Catanese
President and Professor
Florida Atlantic University
P.O. Box 3091
Boca Raton, FL 33431-0991

Dear Dr. Catanese:

In light of recent developments I wish to amend my letter of May 13, 1991 to the Florida Atlantic University Foundation, Inc. and Florida Atlantic University concerning my commitment of $10 million to the Florida Atlantic University Foundation, Inc., $5 million for the purpose of the construction of an arts and humanities building and $5 million for the establishment of two Super Chairs in the amount of $2.5 million each.

It is my intention to alter the schedule of payments on the two Super Chairs as follows:

- payment on Super Chair #1, initially planned to be completed through a $1 million payment on or before December 31, 1991 and the balance of $1.5 million on or before December 31, 1992 is hereby amended to be paid in its entirety of $2.5 million on or before December 9, 1991

- The agreed upon payment plan for Super Chair #2 will remain as stated in the original letter of May 13, 1991 with the exception that the first payment of $500,000 will be made on or before December 9, 1991, rather than on or before December 31, 1991, as specified in the original letter.

It is my understanding that with full payment of the funds for Super Chair #1 the equal match of $2.5 million will be forthcoming promptly from the State of Florida. Likewise, the payment of the first $500,000 on Super Chair #2 will encumber the matching funds ensuring that the State match will be available at the completion of the scheduled payments.

Please do not hesitate to contact me should you have any questions concerning these changes.

Very truly yours,

/s/ Charles E. Schmidt
Charles E. Schmidt, Individually, and on Behalf of the Schmidt Family Foundation

EXHIBIT C

[LOGO] FLORIDA ATLANTIC UNIVERSITY
VICE PRESIDENT, BOCA RATON CAMPUS

July 15, 1994

To: Sandra Norton, Dean
Schmidt College of Arts and Humanities

From: Nathan W. Dean, Vice President
Boca Raton Campus
/s/ Nathan Dean

President Catanese and I have discussed your proposed resignation as Dean, as described in your letter of July 8. With great regret, I will accept your decision to step down, effective with the appointment of your successor, and I am pleased to offer you the following appointment upon your departure from the deanship.

As of that date, we will name you Schmidt Professor and Director of the Schmidt Institute for Comparative Studies. This appointment is for a term of five years and is renewable based on a review of your performance, as with other Eminent Scholar chairs. You will continue, of course, to hold rank and tenure in the Department of Theater. Your salary, on a twelve-month appointment basis, will be $92,000 annually, of which 9/11 will be state-funded and the balance will come from endowment funds. Any future raises or increments will be applied in the same proportions. You will have six months of leave with no assigned teaching responsibilities, to be used during the next two years on any schedule that is mutually agreeable; at other times, as an Eminent Scholar, you will normally be expected to teach one course, presumably at the graduate level in keeping with the intent of the

institute, or to direct one production during each semester of the academic year. The details of your specific teaching or directing assignments and the annual evaluation of your performance of them will be determined by the dean, in consultation with you and the chair of the Department of Theater.

As Schmidt Professor and Director, you will be responsible, under the general oversight of the Dean and the Vice President, for the programs supported by Superchair Two provided by the Schmidt endowment. The objective of the Institute supported by these funds will be to continue the enhancement of our programs in comparative studies by coordinating a program of distinguished visiting faculty in areas of particular promise, with particular attention to recognizing and supporting women scholars, artists, and students. By bringing outstanding individuals to campus in this way, the Institute can contribute immeasurably to the excellence of the college's academic programs, and it can be especially important to the development of the doctoral program. The institute will be housed in appropriate facilities in The Dorothy F. Schmidt Center.

You have made good things happen as dean, and I know you will continue to do so in this new role. I look forward to our continuing joint efforts toward excellence.

c: Anthony James Catanese, President and Professor
Richard L. Osburn, University Provost

I accept the appointment described above: /s/ Sandra K. Norton

[LOGO] CHARLES E. SCHMIDT • INVESTMENTS
[Address Omitted In Printing]

May 13, 1991

Florida Atlantic University
Foundation, Inc.
Florida Atlantic University
P.O. Box 3091
Boca Raton, FL 33431

Gentlemen:

I have enclosed a check for $5 million to The Florida Atlantic University Foundation, Inc. (the "Foundation") as a gift to Florida Atlantic University (the "University") under the State University System Facility Enhancement Challenge Grant Program pursuant to Florida Statute 240.2605. As you know, under that program, our grant will be matched by funds from the Capital Facilities Matching Trust Fund established by the State of Florida for the purpose of planning, constructing and equipping an Arts and Humanities Building on the University campus. Our gift is expressly contingent upon inclusion of the Arts and Humanities Building in the State University System Five-Year Capital Improvement Plan, approval of the building project by the State Board of Regents and delivery of that approval to the Florida legislature, as provided in the Challenge Grant Program. In connection with this gift, it is our understanding that we will be consulted in matters pertaining to the creation and approval of the architectural design, plans and specifications for the building.

We are also hereby pledging an additional gift of $5 million to fund two Super Chairs of $2,500,000 each and

made pursuant to the Florida Endowment Trust Fund for Eminent Scholars. It is our understanding that this gift will also be matched by the State of Florida. This second gift is expressly contingent upon the approval of the aforementioned Arts and Humanities Building by the State Board of Regents. It is also a condition of this second gift that the Foundation waive all administration fees pertaining to these Super Chairs. This second gift will be made in installments, as described below, upon the satisfaction of the above conditions:

1. $1 million on or before December 31, 1991, representing a payment on Super Chair No. 1;

2. $500,000 on or before December 31, 1991, representing a payment on Super Chair No. 2;

3. $1,500,000 on or before December 31, 1992, completing full payment on Super Chair No. 1;

4. $1,000,000 on or before December 31, 1992, representing a payment on Super Chair No. 2;

5. 1,000,000 on or before December 31, 1993 completing full payment on Super Chair No. 2.

It is our understanding that the Super Chairs will be named in a manner that we request and that the funds and interest thereon to be held by the foundation shall be segregated from other Foundation funds.

The funds for all of the above mentioned gifts may be forthcoming from me, individually, or from the Schmidt

Family Foundation, as I (or in my absence my sons) may deem expedient or appropriate.

You have advised us that the Foundation is a duly qualified charitable organization under 501(c) (3) of the Internal Revenue Code and that the Foundation is certified by the Board of Regents as a Direct Support Organization for the University and is a duly chartered active Florida corporation not for profit.

Very truly yours,

/s/ Charles E. Schmidt
Charles E. Schmidt, Individually and on Behalf of the Schmidt Family Foundation

gb/secy/schmidt.lst

[LOGO]

NEWS
[Address Omitted In Printing]

Press contact: Lynn Laurenti
407/367-3020

July 15, 1994

DEAN OF FAU'S SCHMIDT COLLEGE ACCEPTS EMINENT SCHOLAR POST; WILL HEAD NEWLY CREATED INSTITUTE FOR COMPARATIVE STUDIES

Dr. Sandra Norton, dean of Florida Atlantic University's Schmidt College of Arts and Humanities since 1987, will be the first occupant of an Eminent Scholar "Super Chair" established three years ago as part of a record-breaking $20 million endowment, FAU President Anthony James Catanese announced today.

In her new position, Dr. Norton will direct the Schmidt Institute for Comparative Studies, which will bring distinguished visiting scholars to FAU from around the world to enhance the University's arts and humanities programs. Dr. Norton has agreed to continue as dean of the Schmidt College until her successor is appointed.

"Dean Norton has provided energetic, vigorous leadership for The Schmidt College during a period of explosive growth," President Catanese said. "She played a key role in bringing the college to a new level of maturity in terms of its program offerings and resources. Her decision to pursue the new challenge of building a major University institute from scratch comes as the College is poised to enter the proud new era she helped create. We place her at the head of the Schmidt Institute with strong confidence that she will guide it with the same sure hand

that marked her seven years of outstanding service as dean."

Under Dr. Norton's leadership, the College received a $10 million cash gift from Boca Raton philanthropist Charles E. Schmidt and his family. The amount was doubled by state matching funds to become the largest cash grant to academic programs ever received in the history of public education in Florida. Additionally, during Dr. Norton's tenure as dean, the college hired about 30 percent of its current 78-member permanent faculty, substantially upgraded its physical facilities, and introduced new academic programs, including obtaining planning approval for a Ph.D. in comparative studies.

Dr. Nathan Dean, vice president for FAU's Boca Raton campus, said that several months ago Dr. Norton discussed with him her desire to consider a new assignment. "I have accepted Dr. Norton's decision to leave the deanship with great regret," he said. "She has made extraordinary contributions to The Schmidt College and to the University as a whole. I am certain that she will perform with equal determination and success as the Eminent Scholar directing the Schmidt Institute." The Eminent Scholar Chair Dr. Norton will occupy is called a "Super Chair" because it provides unusually substantial resources to facilitate the creation of superior academic programs. The Schmidt Institute will place special emphasis upon recognizing and supporting women scholars, artists and students.

The Schmidt Institute for Comparative Studies will be housed in the Dorothy F. Schmidt Center on FAU's Boca Raton campus. The $10 million Center, now in the

final stages of construction, will be the centerpiece of The Schmidt College for Arts and Humanities when it opens in November.

"I simply could not resist the challenges and opportunities this appointment provides, including bringing the Schmidt Institute from concept to reality," Dr. Norton said. "This is an exciting opportunity of a kind that does not usually occur twice in a career. My commitment to The Schmidt College is total. I believe in its mission and look forward with excitement to continuing to work toward sustaining excellence."

Dr. Norton has a doctorate in communication and theater arts from the University of Missouri. Prior to her arrival at FAU in 1987, she was dean of the School of Arts and Sciences at Eastern Connecticut State University.

EXHIBIT E

Fort Lauderdale Sun Sentinel
16 July 94

DIGEST

Staff reports

FAU scholar selected

Sandra Norton, arts and humanities dean at Florida Atlantic University, was selected to be an eminent scholar on Friday by FAU President Anthony Catanese.

Norton will direct the Schmidt Institute for Comparative Studies and continue as dean of the arts and humanities college until a successor is named.

The Schmidt Institute is named for Boca Raton philanthropist Charles E. Schmidt, who donated $10 million to FAU. That amount was matched by the state to make it the largest cash grant for an academic program in the history of Florida public education.

The institute will be housed in Dorothy F. Schmidt Center, named in memory of Schmidt's wife, on the Boca Raton campus. An official dedication ceremony is scheduled for mid-November.

As the college's first eminent scholar, Norton will be responsible for bringing in distinguished visiting scholars from around the world to enhance the arts and humanities program.

• **EMINENT SCHOLAR NAMED:** Four months after 26 of 55 tenured faculty at Florida Atlantic University's arts and humanities college took a unanimous no-confidence vote about Dean Sandra Norton, she has been designated

to move to a new position. Norton will be the first occupant of an Eminent Scholar "Super Chair," and director of the Schmidt Institute for Comparative Studies. She will continue as dean until someone else is hired for the job. She will be responsible for bringing visiting scholars to FAU from around the world to enhance arts and humanities programs.

[LOGO]

FLORIDA ATLANTIC UNIVERSITY
[Address Omitted In Printing]

November 5, 1993

MEMORANDUM

TO: Sandra Norton, Dean
The Schmidt College of Arts and Humanities

Lester Embree, Eminent Scholar
Department of Philosophy
The Schmidt College of Arts and Humanities

FROM: John T. Jurewicz
Dean of Graduate Studies and Research /s/ J.J.

Robert J. Huckshorn /s/ RJH
Associate University Provost & Associate Vice President, Northern Palm Beach

SUBJECT: Eminent Scholars

During the past several weeks, we have had conversations with each of you regarding the manner in which Dr. Embree functions as an eminent scholar. Based upon those conversations, and a review of your written communications to each other, it appears that there are three primary issues:

1. The affiliation of CARP with the University.
2. The reporting structure for eminent scholars in the University.
3. The eminent scholar's authority in the use of discretionary funds assigned to the position.

The following are our recommendations on how each item should be resolved:

CARP's Affiliation with FAU

The Research Committee and the Graduate Dean have clearly indicated in memos to Dr. Embree that CARP does not function as a BOR designated research center. The graduate Dean suggested that it is more appropriate to consider CARP as a small not-for-profit professional organization. As such, it may be affiliated with the university in the same manner by which the University commonly affiliates with other professional organizations. The normal path for approval is from the faculty through the chairperson and dean to the provost. While Dr. Embree's working relationship with CARP was recognized and approved prior to his accepting the position as eminent scholar, no formal affiliation was defined. It can be done with the dean and chairs' approval.

Reporting Structure for Eminent Scholars

The Provost has made it clear through verbal and written communications that the eminent scholars are housed within the normal academic structure of the University. This implies that the scholar resides in and contributes to a department even though the scholar may be expert in a topic that spans several disciplines. Fundamentally, both Dean Norton and Dr. Embree appear to agree to this.

Financial Responsibility for Eminent Scholars

There is no specific policy regarding the eminent scholars' authority to expend funds allocated to their position. Commonly, eminent scholars have full discretionary use of these funds. Dr. Embree made it clear in his negotiations prior to accepting the position that substantial portions of his discretionary funds would be used in

conjunction with his relationship with CARP. Given this prior understanding, his use of these funds to support his relationship with CARP is appropriate as long as the expenditures are prudent, and consistent with university, state and federal guidelines for financial transactions. Since the University is ultimately responsible for the expenditures, it is appropriate for the chairman, dean, and provost to review them. The review should be made from the view of fiscal responsibility and not programmatic responsibility. Programmatic responsibility is assigned when the appointment as eminent scholar is made. A scholar is liable at the time of his/her review for demonstrating how they have fulfilled the responsibilities of their appointment. If the University wishes to change the programmatic responsibilities assigned to the scholar, it can be done when the position is reviewed, or with the consent of the scholar.

JTJ:ab
cc: L. Berry

[LOGO]

FLORIDA ATLANTIC UNIVERSITY
[Address Omitted In Printing]

April 29, 1996

Mr. Charles E. Schmidt
National Bank Building
150 E. Palmetto Park Rd., #430
Boca Raton, FL 33432

Dear Chuck:

This letter is a follow up to our meeting of April 22, 1996 with Catherine, Dick and yourself, as well as our earlier meeting of March 13, 1996 when I met with you in your office. At both of these meetings we discussed future plans for the Schmidt College of Arts and Humanities.

One of the most exciting aspects of the future is that the Schmidt College has been expanded. The Departments of Political Science, Sociology, and Anthropology have been added to the array of offerings. This means that the Schmidt College has grown not only in size but in quality of instruction. It also adds vital dimensions to our curricula which deal with the past, present and future of these important areas of human endeavor.

Plans for the filling of the two Super Chairs are being implemented. Dean James Malek is creating two search committees that will begin a process by which we will identify two world-class scholars to bring to our University. While we are undertaking this search, Dean Malek intends to bring two or more visiting professors to the Schmidt College starting in Fall 1996, to fulfill the duties and responsibilities of the chairs. We believe that this will

get us back on course to implement the original agreements that we had reached. Incidently, as I was reviewing the gift documents, I noticed that you had reserved the right to name either or both of these chairs. We have been calling them the Schmidt Super Chairs One and Two; not a particularly explicit designation. Perhaps you might want to think about this and we can get together and explore some possibilities.

We agreed that some of the previous uses of funds would be modified. It is my intention to develop a monitoring system by the Dean and University Provost to insure that the funds are spent appropriately. These decisions are best made by the Chair holders themselves, as approved by the Dean and University Provost. In this way, we can maximize the effectiveness of the Chairs by insuring that the expenditures are related to a clear plan of academic development in order to obtain excellence in the Arts and Humanities.

As we discussed, there may be some transitional expenses this year due to some commitments that have been made. The University Provost is identifying these for me, and we will attempt to determine what amounts would be required. It is my intention to see that this transition is fair and orderly so that we can precisely budget the funds in the years ahead, while fulfilling some obligations that have been made recently.

The audit that I discussed with you shows that all expenses that have been charged to the Chair Trust Funds are appropriate and within University rules and regulations. As I mentioned, I have some questions about some of these expenditures that are more related to judgment

rather than auditing standards. I will pursue these questions with the person who is responsible for the expenditures. It will lead to some changes in authority and responsibility for expenditures.

In conclusion, I believe that we have now defined precisely a process by which the goal of searching for excellence can be attained. With new leadership and a worldly view, the Schmidt College of Arts and Humanities will fulfill its obligations as the University emerges as a world-class institution of higher education.

Best personal regards,

/s/ Anthony James Catanese
Anthony James Catanese
President and Professor

/ld
cc: Mr. Richard Schmidt

EXHIBIT L

NEWS
[Address Omitted In Printing]

Florida Atlantic University

Press contact: Lynn Laurenti
407/367-3020

September 5, 1996

FAU PRESIDENT ORDERS RELEASE
OF SCHMIDT DOCUMENTS
Full Review of Schmidt Funds Triggered
By Former Dean's 'Excessive Spending'

Florida Atlantic University President Anthony James Catanese today ordered the release of all correspondence he had with the late Charles E. Schmidt about the $10 million donation Mr. Schmidt made to FAU's arts and humanities programs in 1991. The gift ranks as the largest ever made to an academic program in state history.

Dr. Catanese's action came in response to an order issued on August 30 by Palm Beach Circuit Court Judge John Hoy, who ruled in favor of a disclosure motion filed by attorneys representing Dr. Sandra K. Norton, former dean of the Schmidt College of Arts & Humanities.

Dr. Catanese also said a full financial review of the Schmidt College has been in progress since April, shortly after he became aware of Dr. Norton's "excessive spending patterns."

"The University never had a problem with releasing the documents sought by Dr. Norton," Dr. Catanese said.

"Our sole concern was to obey the law, which we interpreted as providing privacy for donor correspondence. This order allows us to demonstrate that Charles Schmidt placed full confidence in the University's ability to manage the use of his tremendously generous donation. His letters to me contain no references to Dr. Norton, although in personal conversations dating from the time of the gift he displayed no interest in most of Dr. Norton's ideas for spending the money."

Dr. Norton resigned as dean in July 1994. She had served in the position since 1987.

"Dr. Norton was an unpopular dean," University Provost Richard Osburn, the University's chief academic officer, said. "She was considered arbitrary, high handed and unfair by many members of the Schmidt College faculty." She received chronically low evaluations from faculty members in the Schmidt College and in a 1994 secret ballot she was given a vote of no confidence by 24 of [illegible] participating tenured faculty members.

After stepping down as dean, she became director of the Schmidt Institute of Comparative Studies, which sponsors the appearance at FAU of lecturers and other scholars from around the world. This Institute is supported by a portion of the Schmidt donation.

"A Palm Beach Post reporter looked into Dr. Norton's spending practices as head of the Institute and found that she had an extremely liberal policy," Dr. Catanese said. "I was not pleased by the revelation that she spent $17,000 on office furniture and $10,000 on food and entertainment for visiting lecturers. In April, I ordered a complete financial review of both the Schmidt Institute and the Schmidt

College." This review is currently being conducted by FAU Auditor General Jay Semmel.

Dr. Catanese also said:

"A contention has found its way into print that Dr. Norton was the individual primarily responsible for obtaining the $10 million Schmidt donation for the University. This is simply not true. The Schmidts have a relationship with FAU dating back to the earliest years of the University's existence. Over the course of three decades, they have established a truly remarkable record of patronage by endowing more than 100 scholarships, four eminent scholar chairs, an endowed professorship, and many graduate assistantships. In addition, they were of major assistance in establishing FAU's nursing program.

"The record-setting cash gift of $10 million that Mr. Schmidt made to FAU in 1991 to memorialize his late wife Dorothy came as the capstone of his long [illegible]. The Schmidts have brought more than $23 million to FAU including state matching funds. Mrs. Schmidt died in January 1991, and Mr. Schmidt died in May 1996.

The $10 million gift was matched dollar-for-dollar by the state. Half of this was used to build the Dorothy F. Schmidt Center on the University's Boca Raton campus, and the other half was designated to fund two $5 million "super chairs" widely known scholars in the arts and humanities. FAU is currently conducting national searches to find occupants for these chairs. The search committees are headed by Dr. Alan Berger, who holds FAU's Raddock Chair for the Study of the Holocaust, and Dr. William Miller, director of FAU Libraries.

During Dr. Norton's tenure as dean, no searches were initiated. The Schmidt College's current dean, Dr. James Malek, who was appointed last year, has begun searches at the request of Dr. Catanese. Two letters on this subject were included with the documents released today.

Supreme Court U.S.
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No. 01-1236

In The

Supreme Court of the United States

SANDRA K. NORTON,

Petitioner,

v.

ANTHONY CATANESE, RICHARD OSBURN, JAMES MALEK, DAVID ANDERSON, ONDINA FELIPE, CARLA COLEMAN, JEAN L. BALDET, and LYNDA QUILLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Sandra K. Norton brought suit in the United States District Court, Southern District of Florida, naming as Defendants Florida Atlantic University and six members of its administration: Anthony James Catanese, Richard L. Osburn, James S. Malek, David Anderson, Ondina Fel pe and Carla L. Coleman. (R1-1). Her initial Complaint, filed on January 7, 1997, set out four separate claims: a claim under 42 U.S.C. § 1983 against the six individual defendants for alleged violation of her rights under the First and Fourteenth Amendments (claiming that the individual defendants undertook retaliatory action against her after she sought certain documents in connection with a personal employment dispute and then brought a mandamus action in state court to compel release of those documents by the University); a claim against the University for alleged violation of the Equal Pay Act of 1963, 20 U.S.C. § 206 *et seq.* (claiming she was paid less as a faculty member than other similarly situated male faculty members), and two state law claims, one for declaratory relief against the University (asking that she be determined to be the proper holder of an endowed chair at the University), and another for alleged breach of contract (claiming that the University had breached a contract with her by allegedly removing her from the endowed chair). (R1-1).

Each Defendant moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). (R19-1; R21-1; R24-1; R25-1; R26-1; R27-1; R28-1). Norton then moved for leave to

amend her Complaint, which the Court granted on March 10, 1997. (R39-1; R41-1).

Norton's Amended Complaint substituted The Board of Regents of the Division of Universities of the Florida Department of Education (BOR) for the University, since the latter was not an entity capable of being sued. Other than this substitution, the Amended Complaint contained a slight modification of the claim under 42 U.S.C. § 1983. (R42-1).

The individual Defendants again moved to dismiss pursuant to Rule 12(b)(6), as did the BOR. (R45-1; R46-1; R47-1; R48-1; R50-1; R52-1; R563-1). Norton sought leave to file a Second Amended Complaint, which the Court granted on February 25, 1998. (R66-1; R73-1).

The Second Amended Complaint added two additional parties, Jean Louis Baldet and Lynda Quillen, and alleged factually that Norton had been discharged from her employment at the University following an extended controversy with the administration over her refusal to provide a report from a physician estimating the time she was expected to be remain unavailable to tend to her teaching duties due to recuperation from minor surgery. (R89-1 Pet. App. 44-47). The Count against the individual Defendants for alleged retaliation for exercise of First Amendment rights was amended to assert that Norton was discharged for pursuing the present action. (R89-14 Pet. App. 50-52). A new Count against the individual Defendants also alleged that the manner of Norton's discharge had deprived her of a property interest in her

employment with the University in violation of procedural due process rights under the Fourteenth Amendment. (R89-16 Pet. App. 53). The remainder of the pleading was essentially unchanged from the Amended Complaint.[1]

Each of the individual defendants and the BOR again moved to dismiss the Second Amended Complaint under Rule 12(b)(6); the individuals also asked for dismissal from the action on the ground of qualified immunity. (R78-1; R85-1; R86-1; R99-1; R107-1; R109-1; R110-1).

On December 30, 1998, the District Court entered a lengthy and detailed Order dismissing all Counts except that against the BOR alleging Equal Pay Act violations. (R128-1 Pet. App. 12). The claim under 42 U.S.C. § 1983 based upon alleged retaliation for exercise of First Amendment rights was dismissed with prejudice upon the ground that Norton's document request and litigation did not implicate matters of public concern. The District Court, having dismissed the claims against all of the individual Defendants with prejudice, deemed the Defendant's motions based upon qualified immunity to be moot and did not rule upon them. Norton's Motion for Reconsideration was denied on March 23, 1999. (R130-1; R153-1). The action then proceeded against the BOR as the sole Defendant. In January, 2000, Norton sought leave to amend her pleadings to add new claims against the BOR which the District Court denied. (R158-1; R162-1).

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[1] The Second Amended Complaint was factually detailed and contained 59 incorporated exhibits – and totaled 119 pages in length. The Petitioner's Appendix includes only a fraction of these incorporated exhibits.

Norton then dismissed her remaining claim against the BOR and moved for entry of Final Judgment on May 4, 2000. (R170-1; R175-1).

The Court entered Final Judgment for all Defendants on June 1, 2000, and, on June 30, 2000, Norton filed her Notice of Appeal to the Circuit Court of Appeals, Eleventh Circuit. (R177-1; R178-1 Pet. App. 29). The Court of Appeals affirmed the judgment of the District Court in an unpublished opinion on November 6, 2001 (Pet. App. 1). Norton's motion for rehearing and rehearing *en banc* were denied on October 26, 2001 (Pet. App. 31, 32).

B. STATEMENT OF FACTS

Since the appeal below proceeded upon the District Court's dismissal of Norton's Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6), the facts recited herein are drawn exclusively from that pleading with its attached exhibits except for a reference to the Transcript of the hearing upon the Rule 12(b)(6) motions in respect to certain material representations made by Norton's trial counsel.

Sandra K. Norton had served as Dean of the College of Arts and Humanities of Florida Atlantic University from 1987 until her resignation from that position upon a vote of no confidence by the College faculty in July of 1994. (R89-17, 31 Pet. App. 52). Following her resignation as Dean, she remained a faculty member of the University until her termination in May, 1997. (R89-117)..

Florida Atlantic University is a State university operated at the time under the Board of Regents of the Division of Universities of the Florida Department of Education. (R89-2 Pet. App. 35).[2] During all or a portion of the time relevant to the allegations of the Second Amended Complaint, Anthony Catanese was President of the University; Richard Osburn was Provost; James Malek was Dean of the College of Arts and Humanities; David Anderson was Associate Dean of that college; Carla Coleman was Vice President of University Advancement; Jean Louis Baldet was Chairman of the Theater Department; Ondina Felipe was General Counsel for the University and Lynda Quillen was Associate Counsel. (R89-2, 3 Pet. App. 35, 36).

In 1991, Charles E. Schmidt, a local philanthropist and long time benefactor of the school, began contributing funds toward the establishment of two endowed chairs at the University which were initially denominated as Superchair I and Superchair II. (R89-3, 22 Pet. App. 36). Upon Norton's resignation as Dean in 1994, she was offered – and accepted – the position of Director of the University's Schmidt Institute for Comparative Studies.

In April of 1996, a dispute arose between Norton and the University administration when Norton claimed that the offer of the position of Director of the Schmidt Institute entitled her to hold one of the two Superchairs.

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[2] The Board of Regents was abolished effective July 1, 2001, pursuant to a reorganization of the structure of higher education in the State of Florida. § 229.003(5)(A), *Florida Statutes* (2001).

(R89-6, 43 Pet. App. 41). According to Norton's allegations, Malek – then Dean of the College of Arts and Humanities – had allocated some of the funds earned from one of the Superchair endowments to new programs at the College. (R89-6 Pet. App. 40). Norton alleged that this irritated Schmidt and that President Catanese, seeking to "mollify" him, wrote Schmidt a letter on April 29, 1996 detailing the University's efforts at establishing a search committee to identify "two world-class scholars" to hold the chairs. (R89-6, 43 Pet. App. 41).

In the subsequent course of Norton's dispute with the University, she retained a law firm which, on her behalf, made a request under State law for public records. (R89-7 Pet. App. 41-42). Norton's pleadings specifically describe in somewhat convoluted fashion the purpose for which she sought access to those public records:

> 48. Dr. Norton acted within the scope of protected First Amendment rights where she communicated with University officials to obtain documents from the University *to substantiate the position taken by the University that she was not the occupant of Superchair II.* (emphasis added) (R89-14, Pet. App. 50).
>
> . . .

When she did not receive all the records she wanted, Norton, through her counsel, instituted a Mandamus action in State court to obtain those records. (R89-7 Pet. App. 42). The State Court granted Norton's petition and ordered release of the additional documents sought by her. (R89-7 Pet. App. 42). The University, allegedly through Vice President Coleman, issued a press release on September 5, 1996, advising that Catanese had

released the documents – consisting of correspondence between Schmidt and himself – in compliance with the State Court order of August 30. There was no indication that the release was reported by the press. (R89-45).

Norton alleged that Catanese, Osburn, Malek, Anderson, Felipe and Coleman then conspired to retaliate against her for her action in seeking access to the documents and in seeking a "redress of grievance in a court of law" by pursuing her Mandamus action. (R89-8 Pet. App. 42-43, 50). She claimed that retaliation included the seizing of books and records in her office which were available from other sources; the posting of a guard at her office to make note of anyone entering or leaving; threatening discharge if she did not execute her annual employment contract without unilateral changes; undertaking a "witch-hunt" to attempt to uncover financial irregularities in her expenditures, and otherwise embarrassing her in front of colleagues and students. (R89-8, 9 Pet. App. 43).

Norton filed the present lawsuit on January 7, 1997, alleging claims against Florida Atlantic University, Catanese, Osburn, Malek, Anderson, Felipe and Coleman. (R1-1). These claims, all arising out of Norton's personal employment dispute with the University, included a Federal claim under 42 U.S.C. § 1983 alleging that the individual Defendants took retaliatory action against her in response to her efforts to obtain the documents which she believed would assist her in supporting her claim of entitlement to one of the endowed chairs; an Equal Pay Act claim against the University, and two State law claims against the University relating to her claim to be a holder of the chair. On January 14, 1997, she requested medical

leave from Jean Baldet, her departmental chairman for a scheduled surgery to remove a sinus cavity growth. (R89-9 Pet. App. 44-45). At the time she indicated that she expected to return to teach her theater seminar class by January 27. (R89-88).[3] When she failed to return as she had originally advised, Baldet was forced to attempt – with limited success – to locate other faculty to assume charge of Norton's class on an *ad hoc* basis. This situation continued on a "week by week" basis as Norton repeatedly gave Baldet projected return dates, and, before each such date, gave short notice that she would be unable to make the date. (R89-9, 73, 74 Pet. App. 44). After Norton failed to meet several of these projected return dates, Quillen wrote Norton's attorney requesting that Norton provide a statement from her treating physician as to when Norton could be expected to return to her class (at that point it had been without a regular instructor for over a month). (R89-51).

Rather than comply, Norton's attorney demanded to know the legal authority for the request. (R89-52). Quillen provided her a citation to the relevant provisions of the Florida Administrative Code, but Norton's counsel remained unsatisfied. (R89-54, 56). Correspondence continued over the next several weeks between Norton's attorney and both Quillen and the trial counsel for FAU/BOR; deadlines for compliance were given and extended. (R89-57-65).

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[3] This class which began the Winter semester on January 6, 1997 met weekly for 3 hours; Norton only met with her students the first two sessions. (R89-73, 74).

Finally Norton was given an ultimatum that, if she failed to provide the requested statement by March 3, 1997, she would be regarded as having abandoned her job. (R89-43).

Norton never provided the physician's statement, but alleges that she returned to her office on March 3, 1997 – during Spring Break – and picked up some papers for her class. (R89-11, 12 Pet. App. 47).

On March 6, 1997, Osburn forwarded to Norton a letter by overnight delivery advising that the University intended to terminate her employment for cause due to her failure to provide the requested statement. (R89-66). The letter provided a detailed notice of the grounds for her proposed discharge – recounting the need that the University had to determine when she could resume regular attendance of her class sessions and setting forth a listing of the many instances during Norton's leave period when she had given projected return dates, only to cancel them on short notice to the detriment of the students. (R89-68, 69). Attached to it was the provision of the Florida Administrative Code setting forth the University's 3 Step grievance procedure. (R89-68, 69).

Pursuant to Administrative Code procedure, Norton requested a Step 1 grievance meeting before the Associate Provost as hearing officer. (R89-70). Norton and her counsel were present, as were Dean Malek and his counsel and counsel for the University. (R89-70). Each party submitted statements and documentation, and the representative prepared a report with findings and a proposal for resolution on April 16, 1997. (R89-70-78). This proved

unacceptable to Norton who requested a Step 2 proceeding which was held on May 1, 1997, before a second hearing officer. (R89-116). Present were the same parties and counsel as at the Step 1 meeting. (R89-116, 117). On May 2, 1997, the hearing officer filed a decision finding no merit in Norton's exceptions to the proposed discharge and noting that resolution of the dispute was not attainable. (R89-116).

Norton chose not to proceed with the Step 3 review, and, instead, sought leave to file a Second Amended Complaint. (R66-1). In this pleading, Norton charged that she had been the recipient of retaliatory action by the individual Defendants as a result of her pursuit of the documents she felt might be relevant to her dispute over the Superchair position and as a result of her filing the present action. (R89-14, 15 Pet. App. 50). She also charged that the individual Defendants (except Coleman) deprived her of her procedural due process rights in the course of the discharge hearings – contending that the meetings were not held before impartial representatives. (R89-16, 17 Pet. App. 53-54). She reasserted the claims against the BOR that she had previously made. (R89-18-21 Pet. App. 54-58). The Defendants each moved for dismissal pursuant to Rule 12(b)(6). All individual Defendants challenged the First Amendment retaliation claims on the same ground raised in their motion directed to the earlier pleadings – that those activities undertaken by Norton were not protected speech or actions under the First Amendment since they did not implicate matters of public concern; they challenged the validity of the due process claim on the ground that procedural due process did not require an administrative hearing before an

"impartial" officer and that Norton's pleadings established that she had failed to comply with all available steps of State remedial procedures. (R78-1; R85-1; R86-1; R92-1; R99-1; R107-1; R109-1; R110-1). In addition, each Defendant raised the defense of qualified immunity. (R78-2, R85-5; R86-5; R92-2; R99-2; R107-2; R109-1, 2; R110-1, 2).

The BOR also moved for dismissal on several grounds. (R91-1).

In the course of the hearing upon these motions, there was extensive discussion of the First Amendment issue; the Defendants' counsel argued that the request for documents and the Mandamus action as well as the filing of the present action did not constitute protected speech or petition under the First Amendment since both speech and petition actions by government employees were required to satisfy the element of public concern as established in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). (R182-1 et seq.). The Defendants argued that the very terms in which the allegations of the Second Amended Complaint were cast indicated that the actions did not encompass "public concerns". Norton's counsel did not dispute this; instead, she frankly admitted that Norton's actions did not encompass matters of public concern. (R182-31).

The District Judge dismissed the claims against all individual Defendants on December 30, 1998. (R128-1 Pet. App. 12-27). Norton never requested leave to further plead against the individual Defendants.

REASONS FOR DENYING THE PETITION

I

THE PETITIONER'S FIRST ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED FOR TWO REASONS: FIRST, THE CONFLICT IDENTIFIED BY THE PETITIONER IS LIMITED IN EXTENT, INVOLVING ONE DECISION IN ONE CIRCUIT ON ONE SIDE AND THE GREAT MAJORITY OF CIRCUITS INCLUDING THE ELEVENTH CIRCUIT, ON THE OTHER, AND SECOND, A RULING UPON THE ISSUE IN THIS CASE WOULD NOT BE MEANINGFUL IN RESOLVING THE DISPUTE BETWEEN THE PARTIES SINCE, EVEN IF THE "PUBLIC CONCERN" ELEMENT WERE HELD INAPPLICABLE TO PETITION CASES, THE RULE APPLYING IT WAS ESTABLISHED IN THE ELEVENTH CIRCUIT AT THE TIME OF THE ALLEGED RETALIATION AND THE DEFENDANTS WOULD STILL BE ENTITLED TO DISMISSAL UPON QUALIFIED IMMUNITY AS THEIR ALLEGED CONDUCT WAS NOT CLEARLY UNLAWFUL AT THE TIME IT OCCURRED.

The Petitioner first seeks certiorari review arguing that there is a significant and broadly based conflict among the Circuits upon the issue of whether the "public concern" threshold test announced in *Connick v.. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and applied in that case to a First Amendment free speech/ retaliation claim by a public employee should also be applied in cases involving claims of retaliation for the exercise of the First Amendment petition right by public employees.

The Respondents submit that the conflict among the Circuits on this issue is much less significant and more

narrowly based than suggested by the Petitioner, and urge this Court to deny the Petition both because the conflict is one of a lesser dimension than contended and because a decision upon the issue in this Cause can have no impact upon the final determination of the claim.

Although conflict of decisions among the Circuits are a potential basis for the exercise of certiorari review by this Court under Supreme Court Rule 10, conflict in and of itself is not always a sufficient basis for such review. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959); *Beaulieu v. United States*, 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990) (White, dissenting); *Stuckett v. United States Postal Service*, 469 U.S. 898, 105 S.Ct. 274, 83 L.Ed.2d 210 (1984) (White, dissenting); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975).

A careful analysis of the cases from the several Circuits does not disclose a conflict of the dimensions suggested in the Petitioner's argument. Only one Circuit, in one decision, has held that the "public concern" test enunciated in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) does not apply to claims of retaliation in connection with a governmental employee's exercise of his right to petition under the First Amendment. A split panel of the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995), has held that a governmental employee's civil rights claim alleging retaliation by his employer for the employee's exercise of his right to petition is not subject to the "public concern" requirement of *Connick*. The other cases cited by the

Petitioner as being in conflict upon this issue do not in fact conflict with the decision below – nor with the overwhelming majority of Circuits which have ruled upon this matter.

Gable v. Lewis, 201 F.3d 769 (6th Cir. 2000), the first case cited by the Petitioner to be in conflict with the present case, did not involve a governmental employer/employee relationship. The plaintiff in that case received tow referrals from the State Police. Since an employer/employee relationship did not exist, the Court's discussion of governmental employment cases by analogy is merely dicta. The status of this issue in public employment cases in the Sixth Circuit appears unsettled. See *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2678, 129 L.Ed.2d 812 (1994) and *Valot v. Southeast Local School Dist. Bd. of Education*, 107 F.3d 1220 (6th Cir. 1997), *cert. denied*, 522 U.S. 861, 118 S.Ct. 164, 139 L.Ed.2d 108 (1997).

In *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990), the Tenth Circuit held that the plaintiff's petition claim *was* subject to the "public concern" analysis. Prior to its discussion of the petition claim, the Court considered the plaintiff's related freedom of association claim. Finding this claim to be one involving the matter of "expressive association", the Court held it to be subject to the "public concern" analysis, but, in a footnote, suggested that "intimate association" claims might not be subject to the "public concern" analysis. See Strauss, Note: *Public Employees' Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply*, 61 Fordham L.Rev. 473, 476-482 (1992). Turning then to the petition claim, the Court held that " . . . we see no reason to

subject this claim to a different sort of analysis." *Schalk* at 498. The analysis to which the Court subjected the petition claim was the same to which it subjected the "expressive association" claim – one which includes a "public concern" element. There is no suggestion in the *Schalk* opinion that petition claims are analogous to the "intimate association" claims – a category in which it suggests that a "public concern" element might not apply.

The case of *Harrison v. Springdale Water & Sewer Com'n*, 780 F.2d 1422 (8th Cir. 1986), next cited by the Petitioner, involved a dispute arising out of an inverse condemnation matter rather than a public employer/employee relationship.

Finally, the case of *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) was a claim by a prisoner who alleged that he suffered retribution by prison officials as a result of the exercise of his petition right. It, too, did not involve the governmental employer/employee relationship.

This Court found the "public concern" element enunciated in *Connick* to be necessitated by the public employer/employee relationship and the need to protect the interests pertaining to each party in such a relationship. Whether the "public concern" test is appropriately applied in non-public employment situations is an issue irrelevant to the holding by the Court below.

The decision of the Eleventh Circuit, herein, is in accord with the rule adopted by the vast majority of Circuits: *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993), *cert. denied*, 510 U.S. 865, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Day v. South Park Indep. Sch. Dist.*,

768 F.2d 696, 700 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986); *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988); *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984); *Hoffman v. Mayor, Councilmen and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S.Ct. 2368, 141 L.Ed.2d 737 (1998); *Gearhart v. Thorne*, 768 F.2d 1072 (9th Cir. 1985); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998), *cert. denied*, 525 U.S. 819, 119 S.Ct. 59, 142 L.Ed.2d 47 (1998). In addition to those cases applying the "public concern" element where the plaintiff's claim was characterized as one implicating the petition right, the same result has been reached in a number of cases in the Circuits where actions such as the filing of claims or lawsuits were characterized as exercises of free speech. See e.g. *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994).

With the exception of the Third Circuit's solitary decision in *San Filippo* and some uncertainty within the Sixth Circuit – in view of the dicta in *Gable v. Lewis*, supra, the holding in *Rice v. Ohio Dept. of Transp.*, supra, and the questionable holding in *Valot v. Southeast Local Sch. Dist.*, supra – the Circuits which have addressed this issue are otherwise in unanimous accord. The status of the law upon this issue is no more unsettled today than it was when this Court denied certiorari in the *Rendish* and *Grigley* cases. No greater imperative for review lies in the present circumstance.

A second basis exists for the refusal to accept certiorari review upon this issue: no matter how the issue is determined, a decision by this Court upon the foregoing issue cannot result in an outcome different from that which presently exists. Consequently a ruling upon this issue would serve only a theoretical purpose.

In their motions to dismiss, each Defendant below raised the issue of qualified immunity, a defense properly raised in a motion to dismiss. See *Ansley v. Heinrich*, 925 F.2d 1339, 1347 (11th Cir. 1991).

At the time of the actions alleged to have been taken by the Defendants, the established law in the Eleventh Circuit clearly held that such actions taken by an employer or its agents in a public employment situation were not unlawful. See *Badia v. City of Miami*, 133 F.3d 1443, 1446 (11th Cir. 1998) and *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994). In view of his ruling upon the issue of liability *vel non*, the District Judge held that the issues of qualified immunity raised by the Defendants was moot, and he declined to rule upon them. A reversal of the decision upon liability below would then require the District Court to address the issue of immunity. It is apparent that, even if the rule of the Eleventh Circuit applying the "public concern" element to petition cases were reversed, that rule, existing at the time of the actions taken, would nonetheless require a dismissal of all Defendants upon the ground of qualified immunity.

This Court's statement in *The Monrosa v. Carbon Black Export, Inc.*, supra, is fully applicable here:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

359 U.S. at 184

Since a decision by this Court, even if adverse to the decision of the Court below cannot affect the outcome of this litigation, the Respondents would urge that this court decline the invitation to enter into the realm of deciding abstract questions of law.

II

THE PETITIONER'S SECOND ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED SINCE THE CONFLICT AMONG THE CIRCUITS IDENTIFIED BY THE PETITIONER IS ILLUSORY AND SINCE THE FACTS ALLEGED BELOW CLEARLY ESTABLISH THE PROPRIETY OF APPLYING THE "PUBLIC CONCERN" RULE AS WAS DONE BY THE COURTS BELOW.

The Petitioner also seeks certiorari review arguing that the Circuits are split upon the issue of whether the *Connick* rule applies in cases where the public employee has expressed himself or petitioned upon a matter of personal interest rather than of "public concern". She contends that the court below held that the presence of any "personal intent" element deprives expression or

petition from constitutional protection. Her argument misconstrues the facts of this case, the holding of the Court below and the status of the law among the Circuits.

Norton's Second Amended Complaint identified two sets of actions which she characterized as acts of petition and for which she alleged that she sustained retaliation by the Defendants: the first consisted of her seeking documents upon a public records request for the specified purpose of supporting her position in a personal employment dispute with the University and, subsequently, in her filing of a Mandamus action in State Court to compel production of those records not voluntarily produced; the second set of actions consisted of her bringing and maintaining the current lawsuit prior to the time of her discharge. These actions, on account of which Norton alleges that the Defendants retaliated against her, were, however, focused solely upon her long-running personal employment dispute with the University and were devoid of any element of "public concern".

In Paragraph 48 of the Second Amended Complaint, Norton alleged the purpose for which she sought to obtain the documents through the document request and subsequent Mandamus proceeding. In her Petition, Norton is understandably reticent in identifying this allegation which clearly and directly establishes that the focus of her action was in seeking support for her position in an employment dispute regarding whether she was the proper holder of an endowed chair. Paragraphs 25 and 26 of the Second Amended Complaint further establish the background to this employment dispute in furtherance of which she sought evidence to support her claims. The dispute as alleged was an essentially personal one

between Norton and the University. This was the allegation of the Second Amended Complaint and the findings of the District Court and Court of Appeals below.

Just as Norton's document quest was in pursuit of an essentially personal employment dispute, so too the present action through the time of her discharge involved issues which were no more than a continuation and outgrowth of that same employment dispute. The claims brought against the individual Defendants under 42 U.S.C. § 1983 simply sought relief for what Norton claimed was retaliation for those actions taken in support of her employment dispute. The claim against the University for alleged violation of the Equal Pay Act alleged that the University had discriminated only against Norton in respect to matters of employment compensation on account of her sex – it did not allege a general course of discrimination impacting other women at the school. The state law claims sought direct relief for the alleged breach of an employment contract. Since all of these claims, as alleged, involved an essentially personal dispute between Norton and the University, the "public concern" element was clearly lacking.

Although Norton now contends that her personal interest in the Mandamus action was secondary to some greater interest in seeking to bring into the public arena documents – primarily correspondence – relating to the benefactor's intent as to the person who was to hold the endowed chair, the fact remains uncontroverted that she sought them in the course of a personal employment dispute for the purpose of hopefully supporting *her* right to be seated as holder of the endowed chair. Essentially

she seeks to constitutionalize what was, and has been, a personal contract dispute.

Petitioner contends that the Circuits are split upon the effect of the element of a public employee's personal interest in First Amendment cases. A careful reading of the cases cited by the Petitioner demonstrates that the conflict is illusory, and that each case appropriately follows the rule laid down in *Connick v. Myers*, supra, that where the content, form and context of a public employee's speech establishes that its dominant focus is upon the employee's personal employment interest rather than upon matters of public concern, then the Federal Courts are not the appropriate forum for the review of the issues involved in such an employment dispute. 461 U.S. at 147-148.

In the line of cases that Petitioner groups with *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994), it can be seen that each claim involved a significant element of public concern. Thus, in *Tao*, the court noted that the speech in issue raised issues of widespread racial discrimination against Chinese-Americans in the FBI. *Id.* at 640. In *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991), the issue raised by the charges filed related to pervasive and systematic racial discrimination in the Chicago police department. In *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988), the issue raised by the speech involved – a press interview – was pervasive racial animus within the Pennsylvania state patrol. In *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996) the speech involved – an anonymous letter – raised the concerns of an informal association of some 30 black officers to widespread racial discrimination in the

Greenville County Sheriff's office. In each case, the speech clearly addressed matters which extended well beyond the immediate, personal employment dispute which the individual plaintiff had with his governmental employer and addressed matters of such scope and content as to fall within the purview of "public concern".

By contrast, in *Grigley v. City of Atlanta*, supra, the plaintiff's action – pursuing criminal charges against another officer arising out of a personal, physical confrontation in another jurisdiction – was found to have no implication for public concern. In *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997) the plaintiff's action was the filing of an *ante litem* claim in pursuit of an action claiming that the plaintiff had been discriminated against due to a disability. There was no indication of discriminatory conduct extending beyond the plaintiff, himself. Finally, in *Badia v. City of Miami*, supra, the plaintiff claimed that she was discharged after filing a complaint with the EEOC regarding a personal employment discrimination claim and, subsequently, filing a suit on the claim. The Court ruled only on the issue of qualified immunity, noting that in the absence of clear prior authority in the Circuit finding a discharge upon this basis to be a violation of rights, qualified immunity would apply.

In each of the cases identified by the Plaintiff in this second line of cases, the speech or petition action concerned only a claim of discrimination personal to the plaintiff/employee. The two lines of cases thus do not establish the clear conflict contended by the Petitioner, nor do the facts of this case and the rulings below demonstrate conflict with either line of cases.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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